92-1053

No. 92-

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

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NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA"),
*Intervenor-Petitioner,*

v.

RAN-DAV'S COUNTY KOSHER, INC., a New Jersey Corporation t/a COUNTY KOSHER; ARTHUR WEISMAN and NADINE WEISMAN, individually and as officers and shareholders of RAN-DAV'S COUNTY KOSHER, INC.; and NEW JERSEY ALLIANCE OF KOSHER CATERERS,
*Plaintiffs-Respondents,*

and

STATE OF NEW JERSEY; PETER N. PERRETTI, JR.; JAMES J. BARRY, JR.; RABBI YAKOV M. DOMBROFF; ATTORNEY GENERAL'S ADVISORY COUNCIL ON KOSHER FOOD; MORRIS GLATT; DIANE LAMONACO; AND DOES 1-50,
*Defendants-Respondents.*

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**On Petition for a Writ of Certiorari to the Supreme Court of New Jersey**

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## PETITION FOR A WRIT OF CERTIORARI

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December 1992

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## QUESTION PRESENTED

Whether the Establishment Clause prohibits New Jersey's Division of Consumer Affairs from enforcing the New Jersey Consumer Fraud Act against merchants who falsely represent that the food they are selling is "kosher."

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No. 92-

IN THE
UNITED STATES SUPREME COURT
October Term, 1992

NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA"),

*Intervenor-Petitioner*,

v.

RAN-DAV'S COUNTY KOSHER, INC., a New Jersey Corporation t/a COUNTY KOSHER; ARTHUR WEISMAN and NADINE WEISMAN, individually and as officers and shareholders of RAN-DAV'S COUNTY KOSHER, INC.; and NEW JERSEY ALLIANCE OF KOSHER CATERERS,

*Plaintiffs-Respondents*,

and

STATE OF NEW JERSEY; PETER N. PERRETTI, JR.; JAMES J. BARRY, JR.; RABBI YAKOV M. DOMBROFF; ATTORNEY GENERAL'S ADVISORY COUNCIL ON KOSHER FOOD; MORRIS GLATT; DIANE LaMONACO; AND DOES 1-50,

*Defendants-Respondents*.

On Petition for a Writ of Certiorari
to the Supreme Court of New Jersey

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

The National Jewish Commission on Law and Public Affairs ("COLPA"), intervenor in the New Jersey courts, requests that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of New Jersey entered in the above-entitled proceedings on July 22, 1992.

## OPINIONS BELOW

The majority and dissenting opinions of the Supreme Court of New Jersey (Pet. App. A, pp. 1a-55a, *infra*) are reported at 129 N.J. 141, 608 A.2d 1353. The opinions of the Superior Court of New Jersey, Appellate Division (Pet. App. B, pp. 56a-92a, *infra*) are reported at 243 N.J. Super. 232, 579 A.2d 316.

## JURISDICTION

The decision of the Supreme Court of New Jersey was issued on July 22, 1992. On October 8, 1992, Justice Souter extended the time for filing a petition for a writ of certiorari to and including December 19, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

2. The relevant provisions of the New Jersey Consumer Fraud Act and the relevant regulations adopted pursuant to the Act appear in Petitioner's Appendix C, pp. 95a-113a, *infra*.

## STATEMENT

### 1. Kosher Food Laws.

The dietary laws of the Jewish religion restrict the foods that observers may eat. The meat of certain animals, fowl and fish is prohibited, as are designated parts of permitted animals. Meat that derives from animals that have not been slaughtered correctly is forbidden, as well as meat that has not been handled correctly after slaughter. Mixtures of meat and dairy food, finished food products containing prohibited animal derivative ingredients, and certain other foods are impermissible under these dietary laws.

Food that may be eaten under these regulations is called "kosher." There are currently approximately 1.5 million Jews in the United States who conform their diets to the limitations of these rules for religious reasons. There are also approximately 3 million other individuals, both Jewish and non-Jewish, who seek to eat "kosher" foods because they have medical dietary restrictions [1] or because they believe

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[1] For example, people with shellfish allergies purchase kosher products because they know the products will not contain shellfish, which is not kosher. Members of other religious faiths also buy kosher products in order to conform to their own dietary requirements. For example, Moslems buy kosher foods because they know they will not contain pork products.

that "kosher" food, because of the conscientious restrictions on its permissible ingredients, is healthier. [2]

Food producers and merchants are able to charge premium prices for food that is "kosher." *See* 16 N.J.R. 220(a) (social impact statement accompanying the initial adoption of the regulations). Because the consumer assumes that the costs of carefully selecting, inspecting and certifying a product's ingredients are significant, he or she is prepared to pay a higher price for the same food product if it is "kosher" than if it does not qualify as "kosher."

To protect the consumers of kosher food against fraudulent misrepresentation, the legislatures of twenty States have enacted legislation that prohibits the sale of nonkosher food as "kosher." [3] Fifteen of these jurisdictions specify in their laws that the term "kosher" is to be defined by reference to "Orthodox Jewish" or "Orthodox Hebrew"

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[2] One successful food manufacturer, the Hebrew National Company, that produces packaged meats (including hot dogs and salami) advertised successfully for many years: "We answer to a Higher Authority."

[3] *See* Ariz. Rev. Stat. Ann. § 36-942 (Michie 1992); Ark. Stat. Ann. § 20-57-401 (1992); Cal. Penal Code § 383b (Deering 1992); Conn. Gen. Stat. § 53-317 (1990); Ga. Code Ann. § 26-2-331 (1992); Ill. Rev. Stat. ch. 56½, para. 288.1 (1992); Ky. Rev. Stat. Ann. § 367.850 (Baldwin 1992); La. Rev. Stat. 40:608.2 (1992); Md. Code Ann., Com. Law § 14-901 (1991); Mass. Ann. Laws ch. 94, § 156 (Law. Co-op. 1992); Mich. Comp. Laws § 750.297e (1991); Minn. Stat. § 31.651 (1992); Mo. Rev. Stat. § 196.195 (1991); N.Y. Agric. & Mkts. Law § 201-a *et seq.* (Consol. 1992); Ohio Rev. Code Ann. § 1329.29 (Baldwin 1992); 18 Pa. Cons. Stat. § 4107.1 (1991); R.I. Gen. Laws § 21-16-1 (1991); Tex. Bus. & Com. Code § 17.821 (1992); Va. Code Ann. § 18.2-236 (Michie 1992); Wash. Rev. Code § 69.90.010 (1991). The Food and Drug Administration also prohibits such misrepresentation. *See, e.g.*, 21 C.F.R. § 101.29.

standards. [4] Two other laws specify that the "Code of Jewish law" or "Shulchan Aruch" is the standard for determining what is "kosher." [5]

### 2. New Jersey's Regulations.

Consumers in New Jersey are generally protected by the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 *et seq.* (Pet. App. C, pp. 93a-94a, *infra*). New Jersey has no state-wide civil statute dealing specifically with foods represented to be "Kosher." In 1984, New Jersey's Division of Consumer Affairs adopted regulations making it an "unlawful consumer practice" to sell or attempt to sell food "which is falsely represented to be Kosher." The justification for these regulations was expressed as follows (16 N.J.R. 220(a)):

> The preparation of Kosher foods involves certain slaughtering and sanitary procedures and often results in a more

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[4] The state of Michigan, for example, defines "kosher" as "prepared or processed in accordance with orthodox Hebrew religious requirements sanctioned by a recognized orthodox rabbinical council." Mich. Comp. Laws § 750.297e; *see also* Ark. Stat. Ann. § 20-57-401; Cal. Penal Code § 383b; Conn. Gen. Stat. § 53-317; Ga. Code Ann. § 26-2-330; Ky. Rev. Stat. Ann. § 367.850; La. Rev. Stat. 40:608.2; Mass. Ann. Laws ch. 94, § 156; Minn. Stat. § 31.651; Mo. Rev. Stat. § 196.195; N.Y. Agric. & Mkts. Law § 201-a; Ohio Rev. Code Ann. § 1329.29; R.I. Gen. Laws § 21-16-1; Tex. Bus. & Com. Code § 17.821; Va. Code Ann. § 18.2-236. Three states, Arizona, Pennsylvania and Washington, specify that "kosher" means a food product prepared and maintained in accordance with "traditional" Jewish or Hebrew dietary law.

[5] *See* Ill. Rev. Stat. ch. 56½, para. 288.1; Md. Code Ann., Com. Law § 14-901.

> expensive food product. These rules make it illegal to falsely represent food as Kosher or Kosher for Passover and thus protect the consumer who, for reasons of religion, conscience, quality or health, intends to purchase Kosher foods.

The regulations were substantially amended in 1987. They now spell out in detail the display and handling requirements that must be met for food to be labeled as "kosher." These requirements are specified in objective secular terms, and they do not leave any uncertainty about how meat must be handled to permit it to be sold as "kosher." [6]

### 3. Consensus on the Meaning of "Kosher."

The record in this case establishes that there is no dispute within the universe of consumers of kosher food as to the meaning of the term "kosher." The four rabbinical associations that represent the four denominations of Jews in New Jersey — the New Jersey Association of Reform Rabbis, the Reconstructionist Rabbinical Association, the New Jersey Region of the Rabbinical Assembly, and the Rabbinical Council of New Jersey — participated *amicus*

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[6] For example, the requirement that kosher meat must be washed within 72 hours after slaughter and during each subsequent 72-hour period prior to sale is specified in clear terms, in § 13:45A-21.3(a)(2) (pp. 100a-101a, *infra*). The regulation specifies that "[t]he date and time of the day (A.M. or P.M.) of each washing and the name of the person performing such duty shall be legibly indicated on all tags attached to the said meat." Section 13:45A-21.4 lists "Identification requirements" which specify the locations on all meats where the "plumbas" (kosher certification seals) and tags must be affixed.

*curiae* below and submitted affidavits declaring that "all branches of Judaism accept the kosher requirements which have been developed in the Orthodox tradition over the centuries as the standard applicable to all, whether liberal or traditional in observance." *Amicus* Brief on Behalf of the New Jersey Association of Reform Rabbis, *et al.*, p. 1.

### 4. Facts of This Case.

Respondent Ran-Dav's County Kosher, Inc., is a food establishment in Linden, New Jersey. On five separate occasions between 1987 and 1989, investigators employed by the Kosher Enforcement Bureau of the Division of Consumer Affairs visited Ran-Dav's and noted violations of the Regulations. The State then filed a five-count civil consumer fraud complaint against Ran-Dav's. In defense of that action, the respondents challenged the constitutionality of the Regulations on their face. Under New Jersey procedure, the constitutional issue was referred for initial decision to the Appellate Division of the Superior Court. App. Div. R. 1:13-4(a).

### 5. The Appellate Division Decision.

A majority of the Appellate Division rejected the facial challenge. Applying the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the court found that the Regulations had a valid secular purpose — "protection against intentional and negligent misrepresentation in the sale of Kosher food." 243 N.J. Super. at 251 (p. 76a, *infra*). The court also found that the Regulations neither advanced nor inhibited religion in their primary or principal effect (p. 78a, *infra*). Finally, the court concluded that the Regulations did not foster an excessive government entanglement with

religion because no State official was required by the Regulations to resolve religious disputes (p. 81a, *infra*). [7] One judge dissented because, in his view, the Regulations violated the Establishment Clause of the First Amendment.

### 6. The Divided Supreme Court Decision.

The Supreme Court of New Jersey, on a 4-3 vote, reversed. A majority of the Supreme Court found that the regulations promoted excessive government entanglement with religion because the Regulations "contain numerous requirements relating to religious practices essential in the preparation and maintenance of kosher foods" (p. 14a, *infra*). The majority found it constitutionally impermissible to require establishments that sell food as "kosher" to "adhere strictly to religious kosher standards in the conduct of their business" or to "authorize[] the State to monitor the adherence to those standards" (p. 15a, *infra*). The three dissenting justices disagreed with the majority's characterization of the Regulations and observed that the Regulations require only objective and factual inquiries into the manner in which food described as "kosher" is produced and handled. The dissenters noted that there was no evidence of any substantial disagreement over the meaning of the term "kosher" and that the Regulations do not require the State to become involved in religious disputes (pp. 48a-55a, *infra*).

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[7] The majority opinion accepted statements made during oral argument by the State Attorney General's representative that would have permitted a merchant to sell as "kosher" a food product that is universally recognized as non-kosher (such as pork) if a single Orthodox rabbi could be found who would certify it as kosher (p. 70a, *infra*). These statements were withdrawn by the Attorney General in the Supreme Court.

## REASONS FOR GRANTING THE WRIT

### 1. The Importance of the Constitutional Issue.

Hundreds of thousands of Jewish consumers across the United States adjust their diets, to a greater or lesser degree, to the dietary restrictions of *kashrut*. Proof of the significance of kosher certification lies in the increasing ubiquitousness of symbols certifying food products as kosher. Any visitor to a supermarket in the United States can see that many products manufactured and packaged by leading national companies bear marks such as , , the letter "K," or the full descriptive term "kosher." These national companies would not be wasting their money on the procedures needed to obtain kosher certifications if there were not substantial profit to be made from being able to represent a product as "kosher."

And there are possibly several million consumers who are not Jewish and do not care about the religious qualities of kosher food but who seek kosher products because they believe such food has distinctive ingrediential characteristics that are desirable. The kosher food business is now said to be a 30-billion-dollar-a-year industry, and this creates an obvious incentive for merchants who are unscrupulous or careless and see opportunities for quick financial rewards.

This case tests whether State authorities can constitutionally regulate this rapidly growing industry and meaningfully protect consumers who, for reasons of conscience or otherwise, wish to purchase kosher foods. If they accept the reasoning of the four majority members of the New Jersey Supreme Court, governmental agencies in other jurisdictions must abandon effective regulation. Any effort to prevent a seller from labeling a product as "kosher" when he knows that it does not satisfy the ordinary consumer's understanding of that word is, by the decision

below, an impermissible entanglement of church and state because it enforces "a substantive religious standard" (p. 4a, *infra*).

The majority of the New Jersey Supreme Court totally ignored the fact that the merchant who voluntarily uses the term "kosher" (or any other symbol that means "kosher") seeks to exploit commercially a word that has religious content. No seller of food is forced to keep kosher food in his or her place of business, and no one need be concerned about the regulatory definition of the word "kosher" except a merchant who chooses to invoke that word (or its symbol) to describe his product. If a merchant does use the word and seeks thereby to increase his profits, the New Jersey regulations demand only that he satisfy the requirements of the meaning accorded to that term by a consensus of kosher food consumers. [8]

If the split decision of the New Jersey Supreme Court is allowed to stand, it will affect the validity and enforceability of the laws of 20 other States that currently protect purchasers of kosher food against the sale of food misrepresented as kosher. Kosher consumers in those jurisdictions are already less secure in relying on the enforceability of local laws. While the decision below remains law, a merchant who intends to challenge the law if it is enforced against him may seek to sell non-kosher foods

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[8] In requiring merchants to satisfy the expectations of consumers even if there is some basis for the merchants' use of a term to which consumers give a particular meaning, the New Jersey law follows the pattern set by the Federal Trade Commission. *See, e.g., Charles of the Ritz Distributors Corp. v. Federal Trade Comm'n*, 143 F.2d 676 (2d Cir. 1944); *El Moro Cigar Co. v. Federal Trade Comm'n*, 107 F.2d 429 (4th Cir. 1939); *Masland Duraleather v. Federal Trade Comm'n*, 34 F.2d 733 (3d Cir. 1929).

as kosher and count on prevailing in court, as Ran-Dav's did, if his practice is challenged.

Although the court below said that the challenged regulations "violate the Establishment Clauses of the federal and state constitutions" (p. 4a, *infra*; *see also* pp. 10a, 11a, *infra*), it is clear from the opinion of the four-member majority that the ruling does *not* rest on an adequate and independent state ground. After quoting the Religion Clause of the New Jersey Constitution, the court below said that "New Jersey's Religion Clause, which contains no reference to the "free exercise" of religion, "is less pervasive, literally, than the Federal provision" [citation omitted] . . . and therefore the Court has not been impelled to interpret the state constitution more broadly than the federal constitution in cases implicating the establishment of religion" (p. 11a, *infra*). The majority went on to say, "In any event, interpretation of the state constitutional standard is informed by an understanding of federal constitutional doctrine concerning the establishment of religion" (*id.*). The remainder of the constitutional analysis provided by the majority of the New Jersey Supreme Court in this case focuses on the federal constitution and decisions of this Court.

Under standards announced by this Court in *Michigan v. Long*, 463 U.S. 1032, 1037-44 (1983), and the cases that have followed it, this reasoning renders the judgment below fully reviewable in this Court. In this case, the state court's decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law" and "the adequacy and independence of any possible state law ground is not clear from the face of the opinion." 463 U.S. at 1040-41. Hence the most reasonable conclusion is "that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.* at 1041. There is

obviously no "plain statement" in the New Jersey Supreme Court's majority opinion that its ruling is "alternatively based on bona fide separate, adequate, and independent grounds." *Id.* *See also Illinois v. Rodriguez*, 497 U.S. 177, 182 (1990); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 11-12 n.5 (1990); *Pennsylvania v. Muniz*, 496 U.S. 582, 588 n.4 (1990); *Three Affiliated Tribes v. Wold Engineering, P.C.*, 467 U.S. 138, 152-53 (1984).

**2. Conflict Among State Courts.**

The New Jersey Supreme Court's ruling is the first decision of any state court invalidating a kosher food law. In *Barghout v. Mayor & City Council*, 325 Md. 311, 600 A.2d 841 (1992), Maryland's highest court unanimously upheld the constitutionality of that State's kosher food law, which prescribes criminal fines and imprisonment for the sale of nonkosher food as kosher. The court said that vendors who know their product is not kosher, or who believe it is probably not kosher, or who do not really know whether their products are or are not kosher may all be held to violate the law. Only a vendor who "sincerely believes" his product meets the kosher requirements does not violate the statute. The Maryland court went on to uphold the law against a challenge based on Maryland's equivalent of the Religion Clauses. With respect to the statute's specification of "orthodox Hebrew religious rules" as the applicable standard, the court said (600 A.2d at 846, 847):

> "Kosher" means fit according to Orthodox principles, not according to the standards of any other system of belief within Judaism. Since kosher is based on Orthodox Jewish standards, a statutory provision that food is

> properly labeled kosher only if it satisfies Orthodox Jewish standards does not create a denominational preference.

California's Supreme Court upheld that State's kosher food law in *Erlich v. Municipal Court of the Beverly Hills Judicial District*, 55 Cal. 2d 553, 360 P.2d 334 (1961). Although the challenge was not framed in Religion Clause terms, the defendant (who had been convicted of selling nonkosher chicken breasts as kosher) asserted, much as the majority of the New Jersey Supreme Court did (p. 6a, *infra*), that there are varying doctrinal interpretations and disagreements among rabbis on the application of the dietary rules to particular cases. The California Supreme Court rejected the argument and held that there was general recognition of "'the orthodox Hebrew religious requirements' which must be followed in preparation of kosher meat and meat products." 360 P.2d at 337.

Indeed, this Court held in *Hygrade Provision Co. v. Sherman*, 266 U.S. 497 (1925), that the words "kosher" and "orthodox Hebrew religious requirements" as used in New York's kosher food law are sufficiently definite to withstand constitutional challenge. The Court said that "the term 'kosher' has a meaning well enough defined to enable one engaged in the trade to correctly apply it, at least as a general thing." 266 U.S. at 502.

And in *Sossin Systems, Inc. v. City of Miami Beach*, 262 So. 2d 28 (Fla. Dist. Ct. App. 1972), an intermediate Florida court rejected an Establishment Clause challenge to Florida's kosher food law. *See also* authorities cited in Annot., 52 A.L.R. 3d 959 (1973).

### 3. Evolving Constitutional Standards.

The New Jersey Supreme Court's decision is based on an expansive reading of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and particularly its "entanglement" prong. This Court now has under advisement two cases that raise Establishment Clause issues and are affected by the meaning and application of the *Lemon v. Kurtzman* test. A modification of that standard would probably affect the disposition of this case. Accordingly, even if the Court were not inclined to grant a writ of certiorari forthwith to review the ruling below, it would be appropriate to retain this case on the docket to await the disposition of *Larry Zobrest, et al. v. Catalina Foothills School District*, No. 92-94, and *Lamb's Chapel, et al. v. Center Moriches Union Free School District, et al.*, No. 91-2024.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 1992

# APPENDIX

## APPENDIX A

SUPREME COURT OF NEW JERSEY
A-157 September Term 1990

RAN-DAV'S COUNTY KOSHER, INC., a New Jersey corporation t/a COUNTY KOSHER; ARTHUR WEISMAN and NADINE WEISMAN, individually and as officers and shareholders of RAN-DAV'S COUNTY KOSHER, INC.; and NEW JERSEY ALLIANCE OF KOSHER CATERERS,

*Plaintiffs-Appellants*,

v.

STATE OF NEW JERSEY; PETER N. PERRETTI, JR.; JAMES J. BARRY, JR.; RABBI YAKOV M. DOMBROFF; ATTORNEY GENERAL'S ADVISORY COUNCIL ON KOSHER FOOD; MORRIS GLATT; DIANE LA MONACO; and DOES 1-50,

*Defendants-Respondents*,

and

NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS,

*Intervenor-Respondent*.

Argued May 7, 1991 — Decided July 22, 1992

On appeal from the Superior Court, Appellate Division, whose opinion is reported at 243 *N.J. Super* 232 (1990).

*Eric L. Chase*, argued the cause for appellants (*Hannoch Weisman*, attorneys; *Mr. Chase, Genevieve K. LaRobardier*, and *Barbara E. Turen*, on the briefs).

*Andrea M. Silkowitz*, Assistant Attorney General, argued the cause for respondents (*Douglas S. Eakeley*, Acting Attorney General of New Jersey, attorney; *John T. Ambrosio* and *Nancy Costello Miller*, Deputy Attorneys General, on the brief).

*Nathan Lewin*, a member of the District of Columbia bar, argued the cause for intervenor-respondent (*Greenberg & Epstein*, attorneys; *Edward J. Dauber* and *Ina B. Lewisohn*, on the briefs).

*Ronald K. Chen* argued the cause for *amicus curiae* American Civil Liberties Union of New Jersey.

*Bruce D. Shoulson* argued the cause for *amici curiae* The New Jersey Association of Reform Rabbis, The Reconstructionist Rabbinical Association, The New Jersey Region of the Rabbinical Assembly, The Rabbinical Council of New Jersey (*Lowenstein, Sandler, Kohl, Fisher & Boylan*, attorneys).

*Meyer L. Rosenthal* submitted a brief on behalf of *amicus curiae* The Anti-Defamation League of B'nai B'rith.

*Robert Abrams*, Attorney General of the State of New York, submitted a brief *amicus curiae*, *pro se*.

*Albert Burstein* submitted a brief on behalf of *amicus curiae* American Jewish Congress (*Harten, Burstein, Sheridan & Cevasco*, attorneys).

The opinion of the Court was delivered by

HANDLER, J.

In this appeal the Court is confronted with State consumer protection regulations that incorporate a complex body of religious doctrine and contemplate the assistance by clergy or religious experts in the interpretation and enforcement of that doctrine. Those regulations are challenged under the Religion Clauses of the federal and state constitutions that define and govern the relationship between religion and state.

Under regulations administered by the Division of Consumer Affairs, the State regulates the preparation, maintenance, and sale of kosher products. The regulations state that it is "an unlawful consumer practice" to sell or attempt to sell food "which is falsely represented to be Kosher." They define "Kosher" as "prepared and maintained in strict compliance with the laws and customs of the Orthodox Jewish religion." Those regulations were invoked

by the Attorney General, who brought an enforcement action charging Ran-Dav's County Kosher, Inc. (County Kosher) and its principal, Arthur Weisman, with violations. The charged parties denied the allegations and claimed that the regulations violated the Religion Clauses of the federal and state constitutions. The constitutional claims were brought before the Appellate Division while the trial court retained jurisdiction of the enforcement action.

A majority of the Appellate Division upheld the constitutionality of the regulations. *Ran-Dav's County Kosher, Inc. v. State*, 243 N.J. Super. 232 (1990). A dissenting opinion took the position that the regulations were unconstitutional. *Id.* at 259. The issue is whether the kosher regulations facially violate the provisions of the federal and state constitutions that prohibit government establishment of religion. The constitutional issue is substantial, and the dissent brings the appeal to this Court as of right. R. 2:2-1.

We hold that the kosher regulations violate the Establishment Clauses of the federal and state constitutions. Our primary ground for that holding is that the regulations impose substantive religious standards for the kosher-products industry and authorize civil enforcement of those religious standards with the assistance of clergy, directly and substantially entangling government in religious matters.

## I.

The difficult and unusual issue presented on this appeal calls first for an explanation of the subject matter of the challenged regulations and an analysis of the regulatory standards and enforcement procedures. That explanation will inform the inquiry into whether the regulatory scheme takes government too far into the religious domain.

Regulations governing the kosher-foods industry were promulgated in 1984 by the Division of Consumer Affairs under the authority of the Consumer Fraud Act, N.J.S.A. 56:8-4. The regulations make it "an unlawful consumer practice" to sell or attempt to sell food "which is falsely represented to be Kosher." N.J.A.C. 13:45A-21.2.

The word "kosher" (from the Hebrew "kasher") means "fit" or "ritually correct." It is used to refer to, among other things, the Jewish dietary laws. The practice of "kashrut" within Judaism serves to attain "kedusha" or holiness and is a fundamental tenet of the religion. The origin of the kosher laws can be traced back to the Torah (the first five books of the Bible), but most of the laws concerning what is kosher have developed through centuries of Talmudic debates (debates regarding the application of the principles contained in the Torah) and rulings by rabbinic scholars. The dietary laws of "kashrut" set forth rules covering "(1) permitted and forbidden animals, (2) forbidden parts of otherwise permitted animals, (3) the methods of slaughtering and preparing permitted animals, (4) forbidden food mixtures, and (5) proportions of food mixtures prohibited *ab initio* but permitted *ex post facto*." 243 N.J. Super. at 241 (quoting 8 *Encyclopedia of Religion* 270-71 (1987)). The laws of kashrut are complex and exacting. For example, animals must be slaughtered in a prescribed manner by a trained person. Meat must be "koshered" according to specifically defined soaking and salting methods to draw out the blood. *Ibid.* Central to the doctrine of "kashrut" is the requirement of the "mashgiach," the religious authority who must supervise kosher butchers and certify compliance with the laws of kashrut. Without proper religious supervision, certain foods are simply non-kosher, even though constituted and prepared in identical fashion to kosher foods.

The court below suggested that there is universal agreement among the branches of Judaism that the standards governing the preparation and sale of food are those of Orthodox Judaism. *Ibid.* In fact, however, there is considerable disagreement over what precepts or tenets truly represent the laws of kashrut. There are differences of opinion concerning the application and interpretation of the laws of kashrut both within Orthodox Judaism and between Orthodox Judaism and other branches of Judaism. Herman Wouk, *This Is My God* (1959), *reprinted in The Life of Torah* 98-99 (Jacob Neusner ed., 1974). *See* Rabbi Hayim Halevy Donin, *To Be a Jew* 102-104, 112-119 (1972); Rabbi J. David Bleich, *Contemporary Halkhic Problems* 84-92 (1977). Some disputes arise in light of new technologies used in the preparation of foods. Bleich, *supra*, at 86-92. Other disputes arise because many members of the non-Orthodox branches of Judaism take divergent approaches to the adherence to the laws of kashrut, considering certain foods to be kosher even when not prepared in the strictest compliance with certain commonly accepted principles. Wouk, *supra*, at 99. *See* Donin, *supra*, at 103-04, 118-19.

Controversies over kosher products center not only on the nature of the products themselves but on the persons supervising their preparation. Wouk, *supra*, at 99; Donin, *supra*, at 112, 115, 118. Disputes constantly arise within Orthodox Judaism over the legitimacy of the various religious authorities purporting to ensure that food is kosher. *See, e.g., Kashrus Magazine*, September 1990, 26-32 (publishing a "Seven Page Guide" of over 100 rabbinically-supervised kosher supervision services world-wide, but withholding endorsement of any particular service with the following disclaimer: "*Some of the [supervision services] are not relied upon by most of the kosher world. Consult your rabbi for which symbols you should use.*").

Because the laws of kashrut are so complex, compliance with them is highly labor intensive. Kosher food therefore costs more than non-kosher food. Because of those higher prices, and because most consumers cannot determine whether foods labeled as "kosher" were prepared under "kosher standards," unscrupulous vendors can reap substantial profits by misleading consumers into believing their products are kosher. 243 N.J. Super. at 251.

The false promotion of non-kosher foods harms a variety of consumers. Observant Jews may be induced, unwittingly, to break the laws of their religion. Kosher foods are important not only to Jews but to many other persons as well. Adherents to certain other faiths, especially those forbidding the consumption of pork, purchase kosher food to comply with their own religious requirements. People with particular health problems, such as shellfish allergies, buy kosher products to avoid troublesome food. Finally, some members of the general public believe that kosher meat is superior to non-kosher meat because it is prepared under especially close scrutiny. *Id.* at 247-48.

Those concerns are reflected in the social impact statement accompanying the initial adoption of the kosher regulations:

> The preparation of Kosher foods involves certain slaughtering and sanitary procedures and often results in a more expensive food product. These rules make it illegal to falsely represent food as Kosher or Kosher for Passover and thus protect the consumer who, for reasons of religion, conscience, quality or health, intends to purchase Kosher foods.

[16 N.J.R. 220(a).]

The regulations were substantially amended in 1987. *See* 19 N.J.R. 1060(a) (statement accompanying 1987 amendments). The regulations address the preparation, maintenance and sale of kosher products. Throughout, the regulations refer explicitly to the "Orthodox Jewish religion" and the "laws and customs" of that religion to specify the standards that apply to the kosher food industry. "Kosher" is defined by the regulations to mean "prepared and maintained in strict compliance with the laws and customs of the Orthodox Jewish religion." N.J.A.C. 13:45a-21.1. The regulations also impose complicated guidelines governing the actual handling of foods. For example, the regulations expressly require that "Kosher meats must be maintained Kosher and must be properly deveined and, with the exception of liver, washed within 72 hours after slaughter, and within each subsequent 72 hours period in accordance with the laws and customs of the Orthodox Jewish religion." N.J.A.C. 13:45A-21.3(a)(2)(i). Establishments that deal in both kosher and non-kosher food must comply with detailed regulations regarding separation of the former from the latter. *Ibid.* Reflecting the necessity for religious supervision, establishments that sell only kosher food must advise the Director of Consumer Affairs of their rabbinical supervision. N.J.A.C. 13:45A-21.5.

Violations of the regulations are subject to the penalties of the Consumer Fraud Act, namely, injunctions, N.J.S.A. 56:8-8, and fines, N.J.S.A. 56:8-13 (imposing fines up to $2,000 for first offense, up to $5,000 for subsequent offenses). Civil enforcement of the regulations is undertaken by the Bureau of Kosher Enforcement within the Division of Consumer Affairs, in the State Department of Law and Public Safety, which is under the jurisdiction of the Attorney

General. The State Kosher Advisory Committee shares responsibility for the enforcement of the regulations. The Attorney General created that Committee, pursuant to the Consumer Fraud Act and the kosher regulations, by Executive Directive No. 1987-2. The Committee consists of ten rabbis appointed by the Attorney General, nine of whom are orthodox rabbis, the tenth being a conservative rabbi. The Chairman of the Committee is the Chief of the Bureau of Kosher Enforcement. The Committee's function is to "advise the Attorney General on Kosher matters and enforcement of the New Jersey Kosher regulations . . . and make recommendations for regulatory changes." 243 N.J. Super. at 240.

The record indicates that on five occasions during 1987-89, investigators employed by the Bureau of Kosher Enforcement inspected County Kosher and noted possible violations. First, an inspector noticed calves' tongues soaking in a full-strength brine solution. Pursuant to N.J.A.C. 13:45A-21.3(a)(2)(i), Kosher meat must be deveined, but those tongues had not been deveined. Next, an inspector found six boxes of Shelat brand chicken breasts in a storage freezer, a brand of chicken that recently had been determined to be non-kosher. The storage of kosher food with non-kosher food is prohibited by N.J.A.C. 13:45A-21.3(a)(1)(ii). Third, inspectors observed blood and a vein in meat that was to be ground for hamburger, contrary to N.J.A.C. 13:45A-21.3(a)(2)(i). Finally, an inspector noted a problem involving the labeling of meat. County Kosher's operations are supervised by an orthodox rabbi who contended that the establishment's activities complied with the kosher laws. Nevertheless, the foregoing incidents

formed the basis of the consumer fraud charges against appellants. [1]

II

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The United States Supreme Court has explained: "The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Lee v. Weisman*, ___ U.S. ___, ___, ___ S. Ct. ___, ___, ___, L. Ed. 2d ___, ___ (1992) (1992 WL 138525 at 8). The Religion Clauses of the First Amendment have been applied to the states since *Cantwell v. Connecticut*, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940) (Free Exercise Clause) and *Everson v. Board of Education*, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947) (Establishment Clause).

The New Jersey Constitution also contains a Religion Clause. "There shall be no establishment of one religious sect in preference to another." N.J. Const. art. I, para. 4. In *Tudor v. Board of Education of Rutherford*, 14 N.J. 31, 45 (1953), *cert. denied*, 348 *U.S.* 816, 75 S. Ct. 25, 99 L.

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[1] The National Jewish Commission on Law and Public Affairs intervened as a party. Others subsequently joined the litigation as *amicus curiae*, namely, the American Civil Liberties Union (ACLU), the Anti-Defamation League of B'nai B'rith (ADL), the American Jewish Congress (AJC), the National Jewish Commission on Law and Public Affairs (COLPA), Robert Abrams, the Attorney General of New York, and the New Jersey Association of Reform Rabbis, the Reconstructionist Rabbinical Association, the New Jersey Region of the Rabbinical Assembly and the Rabbinical Council of New Jersey.

Ed. 644 (1954), Chief Justice Vanderbilt stated that under both the federal and state constitutions, "the state or any instrumentality thereof cannot under any circumstances show a preference for one religion over another." This Court has observed that New Jersey's Religion Clause, which contains no reference to the "free exercise" of religion, "is less pervasive, literally, than the Federal provision," *Clayton v. Kervick*, 56 N.J. 523, 528 (1970), *vacated on other grounds*, 403 U.S. 945, 91 S. Ct. 2274, 29 L. Ed. 2d 854 (1971), and therefore the Court has not been impelled to interpret the state constitution more broadly than the federal constitution in cases implicating the establishment of religion. *Right to Choose v. Byrne*, 91 N.J. 287, 313 (1982); *Marsa v. Wernik*, 86 N.J. 232, 239-40 n.2, *cert. denied*, 454 U.S. 958, 102 S. Ct. 495, 70 L. Ed. 2d 373 (1981); *Resnick v. East Brunswick Township Bd. of Education*, 77 N.J. 88, 104 (1978); *Clayton v. Kervick*, *supra*, 56 N.J. at 528. In any event, interpretation of the state constitutional standard is informed by an understanding of federal constitutional doctrine concerning the establishment of religion.

The constitutional strictures on government action concerning religion seek to avoid certain evils. They include discrimination among religions or between religion and non-religion, symbolic union between government and a given religious faith or religion in general, sponsorship of the religious mission of a group, excessive entanglement between government and religion, and political divisiveness incited by the government's favoritism of a particular religious faith. *See Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 390, 392-97, 105 S. Ct. 3216, 3227-29, 87 L. Ed. 2d 267, 281-86 (1985); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 794-98, 93 S. Ct. 2955, 2976-78, 37 L. Ed. 2d 948, 975-77 (1973); *Lemon v. Kurtzman*, 403 U.S. 602, 611-15, 91 S. Ct. 2105, 2111-12, 29 L. Ed. 2d 745,

756-57 (1971); *Walz v. Tax Comm'n*, 397 U.S. 664, 674, 90 S. Ct. 1409, 1414, 25 L. Ed. 2d 697, 704 (1970); *Torcaso v. Watkins*, 367 U.S. 488, 495, 81 S. Ct. 1680, 1683-84, 6 L. Ed. 2d 982, 987 (1961).

The basic standard for determining the proper application of the Establishment Clause is the three-pronged test of *Lemon v. Kurtzman*, *supra*, 403 U.S. at 612-13, 91 S. Ct. at 2111, 29 L. Ed. 2d at 756-57. However, in cases of state action that patently create denominational preferences, a different analysis controls. A law that creates "explicit and deliberate distinctions between different religious organizations" must be regarded "as suspect and [subject to] strict scrutiny in adjudging its constitutionality." *Larson v. Valente*, 456 U.S. 228, 246, 102 S. Ct. 1673, 1684, 72 L. Ed. 2d 33, 48-49 (1982); *see Hernandez v. Commissioner*, 490 U.S. 680, 109 S. Ct. 2136, 104 L. Ed. 2d 766 (1989).

The Appellate Division concluded that the regulations did not constitute a *per se* violation of the Establishment clause under *Larson*. It determined that the regulations, by expressly adopting the laws of the "Orthodox Jewish religion," did not prefer Judaism over other religions, and that the enforcement of kosher standards does not disfavor or denigrate any other religion. 243 N.J. Super. at 250. It also accepted the State's argument that the regulations do not prefer Orthodox Judaism over other branches because merchants are free to observe dietary laws according to any standard they choose. *Id.* at 246-47.

The ruling of the Appellate Division that the regulations do not create a preference within the Jewish religion was based mainly on the assumption that the State's enforcement policy under the regulations allows merchants to apply their own sincerely held variant interpretations of

kashrut. *Id.* at 246-47 & n.14, 249, 255, 257-59. However, the State apparently has abandoned its position that the regulations allow different interpretations of the kosher laws. Rather, it now contends that a uniform standard must be applied. See discussion *infra* at __ (slip op. at 22-23). The clear implication of that change of position is that merchants sincerely believing that their products are kosher could nevertheless be prosecuted under the regulations if the State believes that their products do not conform to the standards of Orthodox Judaism as the State defines and applies them.

Despite our doubts surrounding the Appellate Division's ruling that the regulations are valid under the *Larson* test, we decline to invoke that standard, primarily because the record suggests uncertainty concerning both the precise meaning and the enforcement standards of the regulations. In any event, we are satisfied that because of the kosher regulations directly, clearly, and inescapably violate the standards of *Lemon*, we need not resolve the issue of whether the regulations constitute a *per se* violation of the First Amendment under the *Larson* test.

Three elements must be met under *Lemon, viz*:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . . finally, the statute must not foster "an excessive government entanglement with religion."
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> [403 U.S. at 612-13, 91 S. Ct. at 2111, 29 L. Ed. 2d at 755 (quoting *Walz, supra*, 397 U.S.

at 674, 90 S. Ct. at 1414, 25 L. Ed. 2d at 704).]

Because the kosher regulations provide both substantive standards prescribing religious practices and procedures for their enforcement, the entanglement prong, which prohibits excessive government involvement in religious matters, is most germane in assessing the constitutional validity of the administrative scheme.

The prohibition against undue government involvement in religion "rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *People of Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 212, 68 S. Ct. 461, 92 L. Ed. 649, 659 (1948). This prong most closely connects the *Lemon* test to Jefferson's notion of a "wall of separation" between church and state. *See Reynolds v. United States*, 98 U.S. 145, 164, 25 L. Ed. 244, 249 (1879) (quoting reply from Thomas Jefferson to the Danbury Baptist Association, Jan. 1, 1802). The Supreme Court has stated, "Some limited and incidental entanglement between church and state authority is inevitable in a complex modern society, . . . but the concerpt of a 'wall' of separation is a useful signpost." *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123, 103 S. Ct. 505, 510, 74 L. Ed. 2d 297, 305 (1982).

In considering whether the kosher regulations foster excessive governmental entanglement with religion, we initially note that they impose substantive religious standards on establishments purporting to be kosher. Specifically, the regulations contain numerous requirements relating to religious practices essential in the preparation and maintenance of kosher foods. Further, those requirements

must be met "in strict compliance with the laws and customs of the Orthodox Jewish religion." Hence, the administrative scheme does more than require that businesses purporting to be under a certain type of rabbinical supervision are in fact under that type of supervision; it requires such establishments to adhere strictly to religious kosher standards in the conduct of their business and authorizes the State to monitor the adherence to those standards. As a result, Jewish law prescribing religious ritual and practice is inextricably intertwined with the secular law of the State. Further, the State itself takes on the traditional religious supervisory role, thereby partially supplanting the Jewish organizations and institutions that historically have stood as final judges of religious matters.

The State contends that the regulations control only the false promotion and sale of non-kosher products. It acknowledges that the regulations incorporate a substantive religious standard, but argues that doing so is necessary in order to protect consumers of kosher products from misrepresentation. However, the State's adoption and enforcement of the substantive standards of the laws of kashrut is precisely what makes the regulations religious, and is fatal to its scheme. The regulations govern the promotion and sale of kosher products by regulating their antecedent preparation and maintenance. They empower the State to establish fraud or misrepresentation in the promotion of the product by demonstrating that the product was not prepared and maintained in "strict compliance" with what the State itself believes to be "the laws and customs of the Orthodox Jewish religion." In that respect, as pointed out by the appellant, "[t]he regulations do not police the nutritional quality or sanitary purity of kosher food, but only its religious purity." In doing so, they create an unconstitutional entanglement of government and religion analogous to that

recognized in *Spacco v. Bridgewater School Dep't*, 722 F. Supp. 834, 844-47 (D. Mass. 1989), where a municipality leased a Catholic parish center for use as a public elementary school, provided that the town's use of the center would "at all times be consistent with the teachings of the Roman Catholic Church enunciated by the Holy Father and the Bishops in communion with him."

The regulations thus squarely put the State's imprimatur behind certain foods that can be lawfully sold as kosher, and plainly punish merchants who, without State approval, insist that other foods are kosher as well. As we explain below, *infra* at __ (slip op. at 23-24), we cannot construe the regulations, as the dissent would, as providing a "good faith" defense to enforcement actions by the State. *Cf. post* at __ (slip op. at 5-6). We stress, however, that our analysis is based on the Establishment Clause, not the Free Exercise Clause. Under the Establishment Clause, the State can neither impose religious rules nor endorse religious norms.

The State observes that many people purchase kosher products for non-religious reasons and, from that fact, it posits that the concept of "kosher" has assumed a secular as well as a religious meaning. The State confuses the meaning of the law with the motives of consumers. "Kosher" means "ritually correct." To be sure, the ritual correctness of products preparation may be irrelevant to those consumers who purchase kosher food only in order to avoid pork or shellfish, or because kosher food is said to be prepared in more sanitary fashion than non-kosher foods. Nevertheless, the kosher regulations mandate that food sold as kosher be prepared in ritually correct fashion. The religious indifference of some consumers does not empty those regulations of their fundamentally religious character.

The sectarian nature of the regulations is further evidenced by the religious qualifications of the persons selected to enforce the regulations. The Chief of the Bureau of Enforcement is an orthodox rabbi. The Advisory Committee, which is authorized to advise the enforcement agency about compliance with the kosher regulations, consists entirely of rabbis. The Appellate Division and the dissent both suggest, however, that the religious identity of those persons is not important. 243 N.J. Super. at 254; *post* at __ (slip op. at 18).

The employment qualifications of state officials and employees often reflect the nature of their duties. For example, all of the professional boards under the jurisdiction of the Attorney General are composed of persons with special professional qualifications related to their regulatory authority. See generally Title 45, Professions and Occupations, N.J.S.A. 45:1 to 25 (prescribing qualifications for boards such as certified public accounts, architects, barbers, dentists, chiropractors, engineers, marriage counselors, nurses, etc.). The expertise of administrative agencies is an important aspect of the authority they exercise and the deference given to their determinations. *In re Amendment of N.J.A.C. 8:31B-3:31*, 119 N.J. 531, 543 (1990) (according "substantial deference" to regulations of administrative agencies based on a recognition of their "peculiar competence"). In this case, the existence of an Advisory Committee composed of predominantly of orthodox rabbis underscores the theological or religious nature of the State's regulatory endeavors. *See, Lee, supra* ___ U.S. at ___, ___ S. Ct. at ___, ___ L. Ed. 2d at ___ (1992 WL 138525 at 7) (noting that a public school's selection of a rabbi to deliver a benediction at a graduation ceremony underscored the religious nature of the benediction).

We readily acknowledge that the religious persuasion of State employees usually imparts no religious cast to the functions they perform. In this case, however, it is plain that the Committee was constituted as it was precisely because rabbis have the expertise, education, training, and religious authority to interpret, apply, and enforce the regulations. We do not construe the State's regulatory scheme as imposing a religious qualification on its enforcement personnel, and we certainly do not suggest that it ever would be appropriate to *exclude* adherents to particular religions from any state body, but we cannot disregard or discount the manner in which the enforcement entities have been constituted. In this case, as in many others, the manner in which a law has been administered is a strong indicator of the government's understanding of its rules, which can aid our own understanding of their meaning. *See, e.g., Cedar Cove, Inc. v. Stanzione*, 122 N.J. 202, 212 (1991); *Peper v. Princeton Univ. Bd. of Trustees*, 77 N.J. 55, 69-71 (1976). Contrary to the assertion in the dissent that we determine the validity of those rules as applied, *see Post* at ___ (slip op. at 18), we simply observe that the appointment by the State of enforcement officials with religious qualifications confirms that the regulations themselves have a principally religious meaning.

In some ways, this case presents an interrelationship between government and religion reminiscent of those found in *Larkin, supra*, and *State v. Celmer*, 80 N.J. 405 (1979) (partially overruling *Schaad v. Ocean Grove Camp Meeting Ass'n*, 72 N.J. 237 (1977)). In *Larkin*, the challenged statute vested in churches and schools the power to veto applications for liquor licenses within five hundred feet of the church or school. The Supreme Court concluded that the statute enmeshed the churches in the exercise of government powers, violating the entanglement prong of the *Lemon*

Establishment Clause test. 459 U.S. at 127, 103 S. Ct. at 512, 74 L. Ed. 2d at 297. In *Celmer*, the challenged ordinance ceded all munipal law enforcement authority to the United Methodist Church. There we voided a conviction for traffic violations obtained pursuant to the ordinance because it entrusted a religious entity with civil authority. 80 N.J. at 420. In contrast to those two cases, which involved the enforcement by religious bodies of secular or civil law, here we have enforcement by religious personnel of a sectarian or religious law. Thus, in this case the entanglement between religion and state is even more apparent.

The entanglement test under the Establishment Clauses of our constitutions forbids government adoption and enforcement of religious law. That test also forbids government resolution of religious disputes. The government may not "lend its power to one or the other side in controversies over religious authority or dogma." *Employment Div., Dep't of Human Resources v. Smit*h, 494 U.S. ___, ___, 110 S. Ct. 1595, 1599, 108 L. Ed. 2d 876, 884 (1990) (citing *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 445-52, 89 S. Ct. 601, 604-08, 21 L. Ed. 2d 658, 663-67 (1969)); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-25, 96 S. Ct. 2372, 2380-88, 49 L. Ed. 2d 151, 162-71 (1976); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 95-119, 73 S. Ct. 143, 143-56, 97 L. Ed. 120, 126-38 (1952).

The Appellate Division majority concluded that the State would not be involved in doctrinal disputes under the regulations. It apparently believed that disputes would be infrequent and inconsequential because, as stated by the Attorney General, "all branches of Judaism recognize and agree that there is 'a single historical standard of kosher

determination.'" The dissent expresses a similar view, suggesting that the regulations will not give rise to many disputes because they impose a "uniform, objective, and therefore secular standards." *Post* at __ (slip op. at 7).

Our examination of the record and secondary sources reveals that differences of opinion do exist with respect to the laws of kashrut and that disputes do arise. See *supra* at __ (slip op. at 5-7). Because of varying doctrinal interpretations, varying degrees of trust that members of some sects place in the food supervisors of other sects, and varying "shades of observance" undertaken by individual Jews, no one practice can be called "the only true Judaism." Wouk, *supra*, at 99. Disputes may occur infrequently, but when they do, they are ineluctably religious in tenor and content. The dissent criticizes those conclusions as based on information taken from secondary sources. *Post* at ___ (slip op. at 21-22). That criticism must be tempered. We would note that the dissent itself relies on information hardly distinguishable from secondary materials, namely, the beliefs of four rabbis who happen to be associated with the State, to support its assertion that there is unanimity concerning the Jewish dietary laws. Indeed, the authority on which the dissent relies suggests a lack of unanimity. One of the rabbis cited by the dissent concedes that the laws of kashrut evolve as they are "interpreted and construed by authoritative rabbis in each generation." He and another rabbi acknowledge that individual Jews take different approaches with respect to the observance of the laws of kashrut. In addition, many of the cases cited in the dissent for the proposition that the laws of kashrut are "uniform" actually concede that disagreements exist. *See, e.g., Hygrade Provision Co. v. Sherman*, 266 U.S. 497, 45 S. Ct. 141, 69 L. Ed. 402 (1925); *Barghout v. Mayor & City Council*, 600 A.2d 841 (Md. 1992); *National Foods, Inc. v. Rubin*, 727 F. Supp. 104 (S.D.N.Y. 1989).

In any event, we must point out that reliance on secondary materials is entirely proper in cases like this one. As the Supreme Court noted in *County of Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573, 614-15 N.60, 109 S. Ct. 3086, 3112 n.60, 106 L. Ed. 2d 472, 507-08 n.60 (1989), courts should not hesitate to refer "to secondary sources in aid of their Establishment Clause analysis." To ignore secondary sources, said the Court, is to write a judicial "prescription for ignorance." *Ibid.*

The Attorney General concedes that it is neither realistic nor accurate to view the laws of kashrut as being immune from dispute. At one point in the litigation, he took the position that government involvement in disputes over meaning could be avoided by the simple expedient of not deciding them. "[W]here Orthodox Jewish authorities dispute the force of requirement of a particular definition of kosher, the State is precluded from choosing one interpretation over the other"; the bureau would not enforce the regulations against a purveyor who had adopted a variant interpretation of kashrut based on sincerely held beliefs. 243 N.J. Super. at 246 & n.14. However, the State's current position is that "because of consumer expectations, a merchant's or his supervising rabbi's variant, albeit good faith, religious belief that under Orthodox Jewish law pork is kosher, may be regulated by the State."

The Attorney General's current understanding of kosher regulations comports with the actual text of the regulations, which refers to the kosher laws as those being in "strict compliance" with Orthodox Jewish doctrine. N.J.A.C. 13:45A-21.2. The enforcement position of strict compliance also appears to be consistent with prevailing state policy. See generally N.J.A.C. 13:45A-21 and -22 (as amended, 1987) (current kosher regulations calling for strict

compliance and expanding prior regulations by requiring more exacting procedures for preparation and maintenance of kosher foods, for identification of products, and for inspections). *See also N.J.S.A.* 2C:21-7.4 (amended, L. 1988, c. 154) (imposing disorderly persons sanctions for misrepresentation of non-kosher products as kosher, which is defined as strict compliance with Orthodox Judaism).

The Attorney General has acknowledged that the Bureau of Enforcement would be obligated under the kosher regulations to obtain injunctions against merchants adhering to their own understandings of Jewish law in general or Jewish Orthodoxy in particular. The conclusion is inescapable that if a merchant did not adhere to Jewish Orthodoxy, as perceived by the Bureau of Enforcement, and the State legally challenged the merchant's right to sell his or her products as "kosher," a court would have to resolve whether the merchant's view of kashrut diverged from the State's definition of Jewish Orthodoxy. It is difficult to envision a civil controversy stamped more indelibly with religious doctrine.

The laws of kashrut are intrinsically religious, whether they are ambiguous or not and whether they are disputed or not. Religious doctrines cannot be recast as secular principles simply because they are clear. *See, e.g., Spacco, supra*, 772 F. Supp. at 844-47 (recognizing inherent religious character of "the teachings of the Roman Catholic Church enunciated by the Holy Father and the Bishops in communion with him"). Nor do religious doctrines become neutral simply because they are widely or even universally held. *Lee, supra*, ___ U.S. at ___, ___ S. Ct. at ___, ___ L. Ed. 2d at ___ (1992 WL 138525 at 7). Neutral principles are "wholly secular legal rules whose application to religious parties or disputes does not entail theological or doctrinal

evaluations," *Elmora Hebrew Center v. Fishman*, 125 N.J. 404, 414-15 (1989).

We recognized in *Elmora Hebrew Center* that civil courts may resolve controversies involving religious groups if resolution can be achieved by reference to neutral principles of law, but that they may not resolve such controversies if resolution requires the interpretation of religious doctrine. *See, e.g., Jones v. Wolf*, 443 U.S. 595, 602, 99 S. Ct. 3020, 3024, 61 L. Ed. 2d 775, 783 (1979); *Presbyterian Church, supra*, 393 U.S. at 449, 89 S. Ct. at 606, 21 L. Ed. 2d at 665; *Minkin v. Minkin*, 180 N.J. Super, 260, 266 (Ch. Div. 1981); *Avitzur v. Avitzur*, 459 N.Y.S. 2d 572, 574, 58 N.Y. 2d 108, 114-15, 446 N.E. 2d 136, 138, *cert. denied*, 464 U.S. 817, 104 S. Ct. 76, 78 L. Ed. 2d 88 (1983). Neutral principles may be particularly suited for adjudications of property disputes, *Presbyterian Church, supra*, 393 U.S. at 449, 89 S. Ct. at 606, 21 L. Ed. 2d at 665, see *Eldership v. Church of God at Sharpsburg*, 396 U.S., 367, 90 S. Ct. 499, 24 L. Ed. 2d 582 (1970) (Brennan, J., concurring), or civil contract actions, *Walter v. Seton Hall Univ.*, ___ N.J. ___ (1992); *Elmora Hebrew Center, supra,* 125 N.J. at 420; *Jewish Center of Sussex County v. Whale*, 86 N.J. 619 (1981); *see Christian Science Bd. of Directors v. Evans*, 105 N.J. 297, 306 (1987), but not where disputes involve interpretations of religious doctrine itself. *Elmora Hebrew Center, supra*, 125 N.J. at 420 (holding that only religious authorities can determine scope of duties of "orthodox rabbi"); *Chavis v. Rowe*, 93 N.J. 108, 112 (1983); see *Alicea v. New Brunswick Theological Seminary*, 244 N.J. Super, 119 (1990), *aff'd on other grounds*, ___ N.J. ___ (1992). Here, the disputes that would arise under the kosher laws would call inescapably on the State to assume a religious role. The State itself invariably would be one of the disputants, seeking to impose and

enforce its own interpretation of Orthodox Jewish doctrine, and any adjudication by a court of such disputes inevitably would entail the application and interpretation of Jewish law.

The factors that entangle government in religion through the kosher regulations also implicate the effects prong of the *Lemon* test, which dictates that the principal or primary effect of government action neither advance nor inhibit religion. The Appellate Division, untroubled by that prong, stated simply that "[t]he parties and *amici* have not urged a violation of this prong of the test." 243 N.J. Super. at 252. The Appellate Division erred in concluding that a violation of the effects prong was not an issue in this case. County Kosher contended that the kosher regulations violate the effects prong because their religious impact cannot be separated from their secular impact. The State countered by asserting that "the primary effect of the Regulations is the advancement of consumerism." In our view, County Kosher was correct.

According to the State, the regulations work as one element of the Consumer Fraud Act and affect only the commercial activities of selling and advertising merchandise. The State asserts that the regulations do not influence religious concerns; rather, kosher food has overcome its purely religious significance and has taken on a secular significance to the general public. *See County of Allegheny*, *supra*, 492 U.S. 573, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (upholding menorah display adjacent to Christmas tree in park on basis of secular connotations associated with both holidays). The Appellate Division agreed, apparently finding relevant that New York's experience with its kosher statute "has shown no unwarranted effect." 243 N.J. Super. at 259.

We remain unpersuaded by the repeated contention that the laws of kashrut have become secular norms. We are not here confronted with legislation that is religious only in its historical origins but non-religious in its current applications. *E.g.*, *McGowan v. Maryland*, 366 U.S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961) (stating that Sunday closing laws, although religious in origin, are applied without reference to religious purpose or principles); *Vornado, Inc. v. Hyland*, 77 N.J. 347 (1978), *appeal dismissed*, 439 U.S. 1123, 99 S. Ct. 1037, 59 L. Ed. 2d 84 (1979) (same). The kosher regulations rely expressly on religious tenets concerning what is kosher and who should be trusted to supervise kosher food preparation. Because they work both as a constraint and as an inducement on merchants who must abide by them and on consumers who cannot avoid them, the primary, if not exclusive, effect of the regulatory process necessarily is to advance particular religious tenets.

State action that engenders identification of the government with a religion, or religions in general, constitutes the unconstitutional establishment of religion, for it always will advance at least one religion and, depending on the nature of the governmental activity, it often will inhibit other religions as well. In *Grand Rapids School Dist.*, *supra*, 473 U.S. at 389, 105 S. Ct. at 3225, 87 L. Ed. 2d at 281, the Supreme Court stated that the effects prong is violated "when the government fosters a close identification of its powers and responsibilities with those of any -- or all -- religious denominations." Such a close identification plainly is fostered by the enforcement of the kosher regulations, for the State adopts religious law as its own. In addition, as earlier noted, the Chief of the Bureau of Kosher Enforcement and the entire Advisory Committee are rabbis, individuals qualified under Judaic law to interpret the laws of kashrut. Because those individuals are being used by and for

the State in their religious capacity to interpret and enforce state law, the religious and civil authority possessed by them is virtually indistinguishable.

Even a symbolic union between government and religion would contravene the effects prong of the Establishment Clause. *Grand Rapids School Dist.*, *supra*, 473 U.S. at 389, 105 S. Ct. at 3225, 87 L. Ed. at 284. Government practices may not "have the effect of communicating a message of government endorsement or disapproval of religion." *Lynch v. Donnelly*, *supra*, 465 U.S. at 692, 104 S. Ct. at 1367, 79 L. Ed. at 622 (O'Connor, J., concurring). In *Larkin v. Grendel's Den*, *supra*, the Supreme Court observed that "the mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." *Id.* at 125-26, 103 S. Ct. at 511, 74 L. Ed. 2d at 306. The Court concluded that state action promoting such an image violates the Establishment Clause, for it has "a 'primary' and 'principal' effect of advancing religion." *Ibid.* Here, the symbolism is especially graphic and the benefit to religion more than symbolic: the State is calling on religious personnel to enforce and certify religious compliance.

The dissent intimates that the regulations may have been designed to "accommodate consumers who purchase kosher food for religious reasons," but that they do not actually advance a particular religious view. *Post* at ___ (slip op. at 15). However, "an accommodation of religion, in order to be permitted under the Establishment Clause, must lift "an identifiable burden on the exercise of religion." *County of Allegheny*, *supra*, 492 U.S. at 613 n.59, 109 S. Ct. at 3111 n.59, 106 L. Ed. 2d at 507 n.59 (quoting

*Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 482 U.S. 327, 348, 107 S. Ct. 2862, 2875, 97 L. Ed. 2d 273, 291 (1987) (O'Connor, J., concurring). In general, accommodation takes the form of exempting religious groups from laws of general applicability. *County of Allegheny*, *supra*, 492 U.S. at 613 n.59, 109 S. Ct. at 3111 n.59, 106 L. Ed. 2d at 507 n.59; *see Jones v. Butz*, 374 F. Supp. 1284, 1292-93 (S.D.N.Y. 1974), *aff'd*, 419 U.S. 806, 95 S. Ct. 22, 42 L. Ed. 2d 36 (1974) (holding that the Humane Slaughter Act, 7 U.S.C. §§ 1901 et seq. (1970), permissibly accommodates the free exercise of religion by exempting persons of Jewish faith from generally applicable statutory guidelines that proscribe practices mandated by the laws of kashrut).

The regulations at issue in this case do not constitute permissible accommodation of Orthodox Judaism. The Attorney General has not pointed to any state-imposed burdens under which Orthodox Jews currently suffer. If the regulations did not exist, observance of the laws of kashrut would go on, free of state intervention, as it has for thousands of years. The regulations merely serve to advance the form of Orthodox Judaism that the State enforces. "The principal that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." Lee, *supra*, ___ U.S. at ___, ___ S. Ct. at ___, ___ L. Ed. 2d at ___ (1992 WL 138525 at 6).

Finally, to survive an Establishment Clause challenge under the purpose prong of *Lemon*, the regulations also must have a valid secular purpose. State action is invalid under that prong only when there is "no question that the statute or activity was motivated wholly by religious considerations."

*Lynch v. Donnelly, supra*, 465 U.S. at 680, 104 S. Ct. at 1362, 79 L. Ed. 2d at 614.

The State argues that the "secular legislative purpose" of the regulations is to protect consumers against misrepresentation in the sale of food. The focus of the regulations is on the purchase and sale of kosher food, which "is nothing more than a commercial transaction between the merchant and the consumer" carrying no religious significance. The majority of the Appellate Division concurred in the State's position, concluding that the regulations had a valid secular purpose, *viz*, "the protection against intentional and negligent misrepresentation in the sale of Kosher food." 243 N.J. Super. at 251.

The conceptual difficulty with that conclusion is that although the objective of the regulation is to protect against fraudulent sales, the focus of the enforcement provisions is not so limited. That focus is directed to the preparation and maintenance of products in strict compliance with Orthodox Jewish doctrine. The regulations authorize a consumer fraud action founded on the fact that the product itself was prepared or maintained in ritually incorrect fashion, in violation of the laws of kashrut. In that respect, the regulations are, as characterized by appellants, "quintessentially and unavoidably religious in character." The regulations may have been designed to assure truth in marketing, but the truths being marketed are, in essence, religious truths. Troubled though we are by the Appellate Division's holding, we see no need to delve further into the purpose issue in light of our conclusion that the regulations involve the State excessively in religious matters and generate significant effects serving to advance religious interests.

We thus conclude that the kosher regulations as presently formulated violate the Establishment Clauses of the federal and state constitutions.

III

Our decision invalidating the current regulations does not mandate "that the government show a callous indifference to religious groups," *Zorach, supra*, 343 U.S. at 314, 72 S. Ct. at 684, 96 L. Ed. 2d at 962, nor does it leave consumers of kosher products bereft of protections against fraudulent and unscrupulous practices. The State unquestionably has a valid interest in preventing fraud in the sale of any foods, including kosher foods. There are effective ways to achieve that end that will not offend constitutional strictures against state involvement in religion. The State can regulate the advertising and labeling of kosher products. The key to such a regulatory approach would be the religious supervision of the preparation and maintenance of products. The regulation could require those who advertise food products as "kosher" to disclose the basis on which the use of that characterization rests. Many kosher food purveyors would comply by imprinting the symbol of one of the recognized private agencies that supervise kosher compliance (*e.g.*, "U" for the Union of Orthodox Jewish Congregations of America). Other kosher establishments could comply with a disclosure requirement by indicating other forms of rabbinical supervision. Such an approach would thus make use of the kosher foods industry's existing scheme of self-regulation. *See, e.g.*, 243 N.J. Super. at 248 n.15.

The enforceability of such regulations would inhere in the notion that they simply would "compel [the merchant] to perform a secular obligation to which he contractually bound himself" by virtue of the fact that merchant represents food

as being kosher. *Avitzur*, *supra*, 459 N.Y.S. 2d at 575, 446 N.E. 2d at 138. Just as the State may bar promotion of products as having been tested by a certain testing laboratory when they have not been so tested, and just as the State may bar promotion of products as having been endorsed by a certain consumer magazine when they have not been so endorsed, so may the State bar promotion of products as having been prepared under the supervision of a particular rabbi or group of rabbis when they have not been so prepared. Such a consumer protection law would be based on neutral, secular principles, and would be perfectly compatible with the constitutional strictures against governmental establishment of religion.

The regulations at issue, unfortunately, are not limited to such less intrusive means to protect consumers of kosher foods. As they now stand, the regulations plainly violate constitutional standards. We therefore invalidate those portions of the regulations that impose substantive religious standards for the actual preparation and maintenance of kosher food. We do not invalidate the regulations to the extent that they may require the full and accurate disclosure by kosher establishments of the basis on which they advertise and sell their products as "kosher."

We reverse the judgment of the Appellate Division and remand the matter to the trial court for the dismissal of the State's consumer fraud complaint. We also remand to the Division of Consumer Affairs for the expeditious reformulation of the regulations in a manner consistent with this opinion. *See Texter v. Department of Human Servs.*, 88 N.J. 376 (1982).

Chief Justice Wilentz and Justices Clifford and Pollock join in this opinion. Justice Stein has filed a separate

dissenting opinion in which Justices O'Hern and Garibaldi join.

SUPREME COURT OF NEW JERSEY
A-157 September Term 1990

RAN-DAV'S COUNTY KOSHER, INC., a New Jersey corporation t/a COUNTY KOSHER; ARTHUR WEISMAN and NADINE WEISMAN, individually and as officers and shareholders of RAN-DAV'S COUNTY KOSHER, INC.; and NEW JERSEY ALLIANCE OF KOSHER CATERERS,

Plaintiffs-Appellants,

v.

STATE OF NEW JERSEY; PETER N. PERRETTI, JR.; JAMES J. BARRY, JR.; RABBI YAKOV M. DOMBROFF; ATTORNEY GENERAL'S ADVISORY COUNCIL ON KOSHER FOOD; MORRIS GLATT; DIANE LA MONACO; and DOES 1-50,

Defendants-Respondents,

and

NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS,

Intervenor-Respondent.

STEIN, J., dissenting.

The Court today holds that New Jersey's regulations preventing consumer fraud in the sale of kosher products are

facially unconstitutional. The determination whether either the church or the State has intruded impermissibly "into the precincts of the other," *Lemon v. Kurtzman*, 403 U.S. 602, 614, 91 S. Ct. 2105, ___, 29 L. Ed. 2d 745, 756 (1971), is profoundly important and often exceedingly difficult. The danger we seek to avoid stems from the belief that "a union of government and religion tends to destroy government and degrade religion." *Engel v. Vitale*, 370 U.S. 421, 82 S. Ct. 1261, ___, 8 L. Ed. 2d 601, ___ (1962). I commend and share the Court's concern for avoiding even the slightest fissure in the constitutional barrier separating church and State. Here, however, the Court goes too far in finding New Jersey's kosher regulations facially invalid. The Court reaches that conclusion through a strained and technical analysis of the Establishment Clause, ignoring case law and the record before us. It is the first State court to overturn such regulations.

Rather than assisting religion, the regulations reflect the State's strong secular interest in preventing consumer fraud in the sale and marketing of kosher-food products. Although the majority relies heavily on variant interpretations of nuances in kosher observance, the facial challenge here simply is unrelated to the esoteric disputes that have intrigued talmudic scholars over the centuries. I discern no constitutional prohibition against enforcing the regulations when enforcement entails straightforward, objective, factual inquiries that focus primarily not on whether the supplier of the food complied strictly with the detailed requirements of kosher-food preparation but rather on whether the merchant or service establishment has relied in good faith on representations by the supplier that the food has been properly prepared.

The Court reaches its conclusion absent any showing that the regulations are motivated solely by a religious purpose, that enforcement necessarily involves the State in furthering a religion, or that enforcing the regulations entangles the State in religious matters. The majority's reasoning rests substantially on two contentions: that there is considerable disagreement over the meaning of "kosher," and that the administrative scheme confers civil authority on religious persons or entities. The language of the regulations and the record before us, however, do not support those conclusions. Plaintiffs have not produced evidence demonstrating either that agreement over the standards for kosher-food preparation is generally lacking or that the extent of disagreement about the meaning of "kosher" is so substantial as to render all enforcement actions invalid. Further, the majority ignores the longstanding and established precedent recognizing that "kosher" has a meaning in the trade sufficiently well-developed to permit enforcement of kosher regulations. If that standard defines "kosher" in most instances, the regulations may be enforced by referring only to objective and, therefore, secular criteria. Consequently, the regulations do not require the State to make religious determinations.

In addition, the regulations do not require enforcement personnel to be members of the clergy. Nor do they require any religious body to be involved in enforcement matters. The terms of the regulations do not even provide for the Advisory Committee referred to by the majority opinion. Thus, the regulations do not confer governmental power on religious personnel. Because I conclude that the regulations may be constitutionally enforced when they entail application of objective, uniform criteria to identify and address instances of consumer fraud in kosher products, I cannot agree that the regulations are facially invalid.

I

The facial challenge before the Court arose from an enforcement action brought by the Attorney General against Ran-Dav's County Kosher, Inc. (County Kosher), alleging violations of several provisions of New Jersey's regulations governing the preparation, maintenance, and sale of kosher products. *See* N.J.A.C. 13:45A-21.1 to -21.7, N.J.A.C. 13:45A-22.1 to -22.3 (the regulations). County Kosher challenged the regulations' constitutionality in its affirmative defenses and counterclaims to the enforcement action. The trial court, after hearing oral argument, denied the parties' respective requests for injunctive relief and determined that the Appellate Division, not the trial court, was the proper forum for County Kosher's constitutional challenge. A divided panel of the Appellate Division upheld the regulation. 243 N.J. Super. 232 (1991).

The sole issue before us is whether the regulations are facially unconstitutional. No record has been developed regarding the factual disputes involved in the underlying enforcement action, nor has any fact-finding been conducted. We therefore need not and cannot determine whether the regulations would withstand an as-applied challenge.

Preliminarily, we note that the abbreviated record generated by virtue of the facial challenge presented may have misled the majority in its perception and characterization of the regulatory scheme as one that regulates the "antecedent preparation and maintenance" of kosher products. *Ante* at ___ (slip op. at 16). That characterization is simply incorrect. The regulations virtually ignore the technical rules and procedures involved in the preparation of kosher products, omitting for example any reference to so basic an element of kashrut as the method of

slaughter. Rather, the regulatory approach appears to focus not on whether the slaughterhouse or manufacturer properly observed generally-accepted principles in preparing the kosher-food products but on whether the distributor of the food obtained adequate written verification from its suppliers that the food had been properly prepared. In that connection, the regulations contain a so-called "Exculpatory section," N.J.A.C. 13:45A-21.7, providing that no establishment selling or serving food shall have "committed an unlawful practice" if it relied in good faith on representations of a slaughterhouse, manufacturer, processor, packer, or distributor that the food had been prepared in accordance with established standards.

Accordingly, the regulations concentrate on whether those engaged in the sale or service of kosher-food products have complied with the display and handling requirements, N.J.A.C. 13:45A-21.3, mandating separation of kosher and non-kosher foods, appropriate internal signage in display cabinets, use of separate utensils for meat and dairy products, and display of tags on meat products verifying that washing and deveining standards had been met. The regulations also mandate that all kosher meat and poultry offered for sale contain identification tags that had been affixed by the slaughterhouse on designated parts of meat and poultry disclosing the identity of the slaughterhouse, the date of slaughter, and the name of the person who had sanctioned the slaughter. N.J.A.C. 13:45A-21.1; 13:45A-21.4. Even the Violation Report form reproduced in the record, the use of which has apparently been discontinued, reveals that the enforcement of the regulations focuses almost exclusively on display, labeling, and signage, as well as on misrepresentation of food products as kosher. To the extent that we are informed by the regulations and by the truncated record, the regulatory function — contrary to the majority's

characterization — involves primarily verification of objective and uncontroverted requirements, rather than the highly-technical supervision of the slaughtering and preparation of kosher food.

The record contains minimal evidence regarding whether the regulations' reference to Orthodox Judaism imposes a religious standard or whether it refers, in most instances, to a uniform, objective, and therefore secular standard for kosher food processing. To the extent disagreement exists regarding the definition of "kosher," the record does not indicate whether the areas of disagreement are so substantial as to render enforcement constitutionally infirm in all or substantially all instances. Contrary to the majority's contention that the record indicates "considerable disagreement over what precepts or tenets truly represent the laws of Kashrut," *ante* at __ (slip op. at 5), the only reference to that purportedly-broad disagreement is found in an array of articles from various sources attached to the parties' briefs. For example, the parties have submitted several newspaper articles that allude to disagreements among authorities regarding whether particular practices render food kosher. According to other newspaper articles submitted to the court, some authorities believe that a uniform definition of "kosher," derived from Orthodox Judaism, resolves the question whether food is kosher in the vast majority of applications, despite disagreements with respect to fringe issues not raised by most enforcement actions. The parties have offered other articles by various rabbis concerning whether particular foods and food products are kosher. Those articles, however, do not indicate whether those foods are involved in a significant proportion of the State's enforcement actions. Neither do any of the secondary sources surveyed refute the conclusion that widespread

agreement exists concerning a significant body of kosher-food-preparation principles.

The record also includes the affidavits of four rabbis, representing each of the four branches of Judaism: Orthodox, Conservative, Reform, and Reconstructionist. Each of those Rabbis attests that his branch of Judaism recognizes Orthodox Judaism as the source of law regarding kosher preparation of food. Although they each acknowledge some measure of disagreement concerning particular food-preparation practices, all maintain that most kosher practices are governed by unitary, acknowledged standards as interpreted by Orthodox Judaism.

Additionally, the record does not establish that the regulations, on their face, require either the involvement of any religious officials or the employment of persons of a particular religious background in enforcement matters. The regulations do not require that a religious official hold any of the enforcement positions. Although Rabbi Dombroff, the current Chief of Enforcement, is a rabbi, rabbinical training is not required for the job. Indeed, the previous Chief of Enforcement was neither a rabbi or an observant Jew.

Further, the role of the State Kosher Advisory Committee (the Committee) is not at issue in this facial challenge because the Committee was established by Executive Order; the regulations do not provide for or refer to such a committee. Even if the Committee's role was at issue, the parties present no evidence of any specific instance in which the Committee advised enforcement authorities about compliance with the regulations. A deputy attorney general representing the Bureau of Kosher Enforcement (the Bureau) certified that she had had no contact or involvement with the Committee in the two years she had represented the

Bureau, and that the Committee had not participated in any of the Bureau's adjudicatory functions.

II.

In considering the constitutional challenge before it, the Court must determine whether the regulations, on their face, violate the First Amendment. As the United States Supreme Court has said, "It has not been the Court's practice, in considering facial challenges to statutes * * * to strike them down in anticipation that particular applications may [produce unconstitutional results]." *Roemer v. Board of Pub. Works*, 426 U.S. 736, 761, 96 S. Ct. 2337, ___, 49 L. Ed. 2d 179, 196 (1976). Accordingly, a statute or regulation may be valid on its face but invalid in a particular application. *See Bowen v. Kendrick*, 487 U.S. 589, 601 S. Ct. 2562, ___, 101 L. Ed. 2d 520, 535 (1988); *Tilton v. Richardson*, 403 U.S. 672, 682, 91 S. Ct. 2091, ___, 29 L. Ed. 2d 790, 801 (1971) ("We cannot, however, strike down an Act of Congress on the basis of a hypothetical 'profile.'"). Thus, a statute or regulation is facially unconstitutional only if the constitution is necessarily violated every time the law is enforced. *See Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 779-80, 93 S. Ct. 2955, ___, 37 L. Ed. 2d 948, 967 (1973) (holding statutes providing maintenance and repair benefits to private schools facially invalid because of inevitable effect of subsidizing religious mission of sectarian schools). That comports with the settled notion that a regulation or statute will be construed to avoid constitutional defects if it is reasonably susceptible of such a construction. *New Jersey Bd. of Higher Educ. v. Board of Directors*, 90 N.J. 470, 478 (1982); *State v. Profaci*, 56 N.J. 346, 350 (1970).

In considering whether governmental regulation of consumer fraud in the sale of kosher foods violates the First Amendment, we note that

> [i]n every Establishment Clause case, we must reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that, as the Court has so often noted, total separation of the two is not possible.
>
> [*Lynch v. Donnelly*, 465 U.S. 668, 672, 104 S. Ct. 1355, ___, 79 L. Ed. 2d 604, 609 (1984).]

We are guided by the principle that the Constitution does not "require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Id.* at 673, 104 S. Ct. at ___, 79 L. Ed. 2d at 610. Because the United States Supreme Court "consistently has declined to take a rigid, absolutist view of the Establishment Clause," our analysis under this test must entail a careful balancing of all the circumstances. *Id.* at 678-79, 104 S. Ct. at ___, 79 L. Ed. 2d at 613.

To evaluate County Kosher's facial challenge to the regulations on Establishment Clause grounds, the Court must apply the standard first articulated in *Lemon*, *supra*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745. I note initially that the regulations need not be subjected to a strict-scrutiny analysis as articulated in *Larson v. Valente*, 456 U.S. 228, 102 S. Ct. 1673, 72 L. Ed. 2d 33 (1982), because they do not discriminate among different religions or religious sects.

Therefore, under the three-pronged *Lemon* test, the regulations would be invalid under the Establishment Clause "only if [they are] motivated wholly by an impermissible purpose, if [their] primary effect is the advancement of religion, or if [they] require[] excessive entanglement between church and state." *Bowen*, *supra*, 487 U.S. at 602, 108 S. Ct. at ___, 101 L. Ed. 2d at 536 (citations omitted); *see also Lemon*, *supra*, 403 U.S. at 612-13, 91 S. Ct. at ___, 29 L. Ed. 2d at 755 (setting forth three-pronged test).

The first prong of the *Lemon* test evaluates whether the regulations were motivated by a religious purpose. *Id.* at 612, 91 S. Ct. at ___, 29 L. Ed. 2d at 755; *Lynch*, *supra*, 465 U.S. at 679-80, 104 S. Ct. at ___, 79 L. Ed. 2d at 613-14. In order to invalidate state action under this prong, the religious purpose must predominate. *Edwards v. Aguillard*, 482 U.S. 578, 599, 107 S. Ct. 2573, ___, 96 L. Ed. 2d 510, 529 (1987) (Powell, J., concurring); *Wallace v. Jaffree*, 472 U.S. 38, 56, 105 S. Ct. 2479, ___, 86 L. Ed. 2d 29, 43 (1985). Even in the face of substantial benefits to religion, governmental action has been held to be consistent with the Establishment Clause where motivated by a secular purpose. *Lynch*, *supra*, 465 U.S. at 680, 104 S. Ct. at ___, 79 L. Ed. 2d at 614; *see Board of Educ. v. Allen*, 392 U.S. 236, 88 S. Ct. 1923, 20 L. Ed. 2d 1060 (1968) (upholding statute that required local public school authorities to lend textbooks free of charge to children in private parochial schools); *Everson v. Board of Educ.*, 330 U.S. 1, 7, 18, 67 S. Ct. 504, ___, ___, 91 L. Ed. 711, 719, 725 (1947) (upholding statute that authorized reimbursement to parents for monies expended for their children's bus transportation to parochial school).

Here, the regulations serve the secular purpose of protecting consumers from fraud in the sale of kosher food. As we were informed at oral argument, the kosher-food

industry involves a vast commercial market, representing approximately $1.5 billion in sales annually. The industry is particularly susceptible to fraud because consumers cannot readily discern whether food has been prepared in compliance with kosher laws, thus non-kosher food products can easily be represented to be kosher. The Division of Consumer Affairs' statement accompanying the proposed regulations underscores the Division's intent to protect consumers from misrepresentation of kosher products, regardless of whether the consumer purchased the goods for religious or other reasons.

> The proposed new rules make it unlawful for any establishment engaged in the sale of food or food products to sell, offer for sale, serve or possess with intent to sell, any food [that] is falsely represented as Kosher.
>
> * * * *
>
> * * * These rules make it illegal to falsely represent foods as Kosher or Kosher for Passover and thus protect the consumer who, for reasons of religion, conscience, quality or health, intends to purchase Kosher foods.
>
> [16 N.J.R. 220 (Feb. 6, 1984).]

The parties do not contest either the State's power to promulgate regulations to protect consumers or the secular nature of that power. Indeed, the majority concedes that "the objective of the regulation is to protect against fraudulent sales." *Ante* at ___ (slip op. at 31-32).

The regulations retain their valid secular purpose despite their incorporation of a religious definition. *Cf. People v. Atlas*, 170 N.Y.S. 834, 835 (App. Div. 1918), *aff'd*, 230 N.E. 921 (1921) (recognizing that purpose of New York's kosher law, to prevent fraud, is within the Legislature's general police power). The mere reference to religion need not render a statute or regulation facially unconstitutional. For example, the Humane Slaughter Act, 7 U.S.C. §§ 1901-1906, withstood an establishment clause challenge although it includes within its definition of humane, "slaughtering in accordance with the ritual requirements of the Jewish faith." *See Jones v. Butz*, 374 F. Supp. 1284 (S.D.N.Y.), *aff'd*, 419 U.S. 806, 95 S. Ct. 22, 42 L. Ed. 2d 36 (1974). There, the court found a secular legislative purpose in that Congress intended "to establish humane standards for the slaughter of livestock." *Id.* at 1293. It concluded that the fact that the Act's provision "defining humaneness coincided with the method of Jewish ritual slaughter * * * neither advanced nor inhibited religion." *Ibid.* Similarly, here the regulations refer to a religious definition in order to serve a valid secular purpose of eliminating consumer fraud. Therefore, incorporating Orthodox Jewish standards does not undermine the regulations' secular purpose.

Further, even if the regulations had been intended in part to accommodate the religious practice of a particular group, they need not be invalidated. The "purpose" prong "does not mean that the law's purpose must be unrelated to religion." *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 335, 107 S. Ct. 2862, ___, 97 L. Ed. 2d 273, 282 (1987). The State may respect "the religious nature of our people and accommodate[] the public service to their spiritual needs." *Zorach v. Clauson*, 343 U.S. 306, 314, 72 S. Ct. 679, ___, 96 L. Ed. 954, 962 (1952). Accordingly, even if

the regulations had been designed in part to accommodate consumers who purchase kosher food for religious reasons, they would not violate the "purpose" prong because the regulations nevertheless serve the secular purpose of protecting both religious and non-religious consumers from fraud.

The second prong of the *Lemon* test provides that the regulations' principal or primary effect must neither advance nor inhibit religion. *Lemon*, *supra*, 403 U.S. at 612, 91 S. Ct. at ___, 29 L. Ed. 2d at 755. In evaluating the effect of governmental conduct under the Establishment Clause, we must determine whether "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." *Allegheny County v. ACLU*, 492 U.S. 573, 597, 109 S. Ct. 3086, ___, 106 L. Ed. 2d 472, 497 (1989) (quoting *Grand Rapids v. Ball*, 473 U.S. 373, 390, 105 S. Ct. 3216, ___, 87 L. Ed. 2d 267, 281 (1985)). Thus, even if some advancement of religion will result from governmental action, there is no impermissible effect if the "reasons or effect merely happens to coincide or harmonize with the tenets of some * * * religion[]." *Lynch*, *supra*, 465 U.S. at 682, 104 S. Ct. at ___, 79 L. Ed. 2d at 616 (quoting *McGowan v. Maryland*, 366 U.S. 420, 442, 81 S. Ct. 1101, ___, 6 L. Ed. 2d 393, ___ (1961)).

The context of the religious reference or symbol is therefore critical in determining whether governmental action has an impermissible effect. *Allegheny*, *supra*, 492 U.S. at 595-98, 109 S. Ct at ___, 106 L. Ed. 2d at 496-98. Explicitly-religious references may consequently be permissible in a context that conveys a secular message and does not communicate an endorsement of any particular

religion. *See Id.* at 618-20, 109 S. Ct. at ___, 106 L. Ed. 2d at 510-11 (holding that menorah included in holiday display along with other secular holiday symbols created no impermissible effect); *Bowen*, *supra*, 487 U.S. at 604-15, 108 S. Ct. at ___, 101 L. Ed. 2d at 537-544 (holding that statute providing funding for services relating to adolescent sexuality and pregnancy, which expressly encouraged federally-supported services to promote the involvement of religious organizations, had no impermissible effect); *Lynch*, *supra*, 465 U.S. at 671, 681-83, 104 S. Ct. at ___, 79 L. Ed. 2d at 608-09, 615-16 (holding that creche containing both secular and religious representations had no impermissible effect).

I conclude that the regulations prohibiting consumer fraud in the sale of kosher products do not have the impermissible effect of advancing religion. No showing has been made that the State's enforcement will be perceived as endorsing Orthodox Judaism or as disapproving other religious choices. Enforcement does not encourage consumers to purchase kosher food, nor does it encourage merchants to sell kosher food. Further, because the regulations on their face authorize factual inquiries in order objectively to apply non-disputed kosher principles, the State is not forcing compliance with a particular religious interpretation; rather, it enforces unitary standards that do not favor a particular religion or religious sect.

The regulations' reference to Orthodox Judaism must be considered in the context of a regulatory scheme focused on protecting all consumers of kosher products. As the majority acknowledges, "[t]he false promotion of non-kosher foods harms a variety of consumers" including members of other religions, people with particular health problems, and others who believe kosher meat is superior because it is

prepared under close supervision. *Ante* at ___ (slip op. at 7). The representation that fewer than one-third of the consumers of kosher products are Jewish indicates that the regulations have the effect of protecting a broad group of consumers, not just persons of a particular religion or religious sect. Therefore, enforcement provides no direct support to any particular religious organization. Thus, the regulations do not have an impermissible effect merely because they incorporate a religious reference.

Furthermore, the reference to Orthodox Judaism does not advance a religion by identifying the State with a religion or by creating a symbolic union of government and religion. *See Grand Rapids, supra,* 473 U.S. at 389, 105 S. Ct. at ___, 87 L. Ed. 2d at 281. The majority reasons that such an identification is fostered by the fact that the Chief of the Bureau of Kosher Enforcement and the members of the Advisory Committee are rabbis, and because "those individuals are being used by and for the State in their religious capacity to interpret and enforce state law." *Ante* at ___ (slip op. at 29). That assertion ignores the fact that the regulations, on their face, do not rquire either the Chief or the inspectors to be rabbis or even to be Jewish. Significantly, the Chief of Enforcement who preceded Rabbi Dombroff was not a rabbi or an observant Jew, and one of the current inspectors is not Jewish. Rabbi Dombroff's role here might be more relevant to an as-applied than to a facial challenge. Even in that context, however, that the current Chief of Enforcement happens to be a rabbi cannot be said impermissibly to confer civil authority on a religious person.

Moreover, the regulations themselves do not mention the creation, existence, use, or composition of the Advisory Committee. Putting aside the paucity of evidence regarding the Committee's actual involvement in enforcing the

regulations, the Committee is simply not relevant to this facial challenge because it is not referred to within the regulations. Even in an as-applied context, the record does not establish that the Committee has exercised governmental power. The record contains no evidence of a single instance in which the Committee had been consulted or in which it advised the Chief of Enforcement regarding compliance. The sole evidence in the record of the Committee's involvement is one comment purportedly made by Rabbi Dombroff to County Kosher's attorney that he consulted with the Committee "when h[e] felt it necessary." The regualtions, therefore, do not require or provide for the intervention of any religious personnel. On their face, then, the regulations do not identify the State with a particular religion, nor do they have the effect of furthering establishment of a religion in violation of the First Amendment.

Under the third prong of the *Lemon* standard, government action "must not foster 'an excessive government entanglement with religion'" in order to withstand an establishment-clause challenge. *Lemon, supra,* 403 U.S. at 613, 91 S. Ct. at ___, 29 L. Ed. 2d at 755 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674, 90 S. Ct. 1409, ___, 25 L. Ed. 2d 697, 704 (1970)). In applying that test we note that "[t]here is no exact science in gauging the entanglement of church and state," and emphasize that it is "*excessive* entanglement" that is prohibited. *Roemer, supra,* 426 U.S. at 766, 96 S. Ct. at ___, 49 L. Ed. 2d at 199.

The majority determines that the regulations foster excessive entanglement because they "impose substantive religious standards," *ante* at ___ (slip op. at 15) and "authorize[] the State to monitor the adherence to those standards." *Ante* at ___ (slip op. at 16). However, as discussed *supra* at ___ (slip op. at 5-7), the regulations focus

primarily on whether kosher foods offered for sale comply with the various display, identification, and verification requirements; they do not address other aspects of kosher-food preparation, such as the requisite method of slaughtering animals or poultry. Accordingly, the regulations appear to contemplate a relatively unintrusive form of monitoring that attempts to limit the evaluation to objective rather than religious judgments. Thus, the inspection of a kosher-food establishment's compliance with the regulations involves a routine and objective inquiry concerning whether, for example, the food offered for sale is displayed as either kosher or non-kosher, whether kosher and non-kosher foods are separated, whether identification tags are affixed to the respective parts of kosher meats, and whether the tags on meats indicate that they had been washed and deveined. That an inspector requires no religious training or background to perform those functions is self-evident. The inquiry is essentially the same as that conducted by an inspector evaluating compliance with health and safety regulations. Therefore, rather than policing the "religious purity" of kosher food, the State, through the regulations, merely enforces another of its consumer codes.

The majority also reasons that the regulations foster excessive entanglement because of "difference of opinion * * * with respect to the laws of kashrut." *Ante* at ___ (slip op. at 22). Concededly, some religious scholars may disagree over nuances of kosher-food-preparation standards. However, those disagreements are not implicated by the objective regulations at issue here. Even if they were relevant, neither the record nor the secondary sources surveyed establish that those disputes are so pervasive and substantial as to engender a dispute over religious doctrine in the routine enforcement actions contemplated by the regulations. See *supra* at ___ (slip op. at 7-8). That

secondary sources may inform the Court concerning background questions relevant to the litigation before it does not sanction their use by the majority as substantive evidence of central issues vigorously disputed by the parties. *Cf. Allegheny, supra*, 492 U.S. at 614 n.60, 109 S. Ct. at ___ n.60, 106 L. Ed. 2d at 507-08 n.60 (discussing use of secondary sources). Further, disputes over the various "shades of observance" or of the true nature of Judaism are not germane to our inquiry because they advert to personal choices concerning religious beliefs, not to the standards for preparation of kosher foods on which a broad range of consumers rely.

Plaintiffs assert that no unitary standard exists for determining whether food is kosher. The only documents in the record supporting that claim are a number of newspaper articles, which are not admissible as evidence of the facts stated therein. *State v. Otis Elevator Co.*, 10 N.J. 504, 509 (1952); *Samuel Sheitelman, Inc. v. Hoffman*, 106 N.J. Super. 353, 356 (App. Div. 1969). The record does not reflect that any party requested the Appellate Division or this Court to take judicial notice of any of the articles submitted or of any facts that they recite. Evid. R. 9(3). Had such a request been made, the articles surely would not have been appropriate subjects for judicial notice because they address matters sharply disputed in this case. *See* Evid. R. 9(2); *Essex County Div. of Welfare v. Harris*, 189 N.J. Super. 479, 481-82 (App. Div. 1983). In contrast, the affidavits of rabbis representing each branch of Judaism assert that each branch recognizes Orthodox Judaism as the source of kosher law, and maintain that most kosher practices are governed by unitary principles.

In addition, the conclusion that the regulations are entirely religious contradicts the long-established holdings of

many courts, including the United States Supreme Court, that references to Judaism in kosher regulations refer to sufficiently definite and objective standards capable of enforcement by courts when there is no disagreement among religious authorities about whether a particular food is kosher. For example, the United States Supreme Court recognized that a similar New York statute providing consumer protection for kosher foods was not unconstitutionally vague. The Court noted that "the evidence, while conflicting, warrants the conclusion that the term 'kosher' has a meaning well-enough defined to enable one engaged in the trade to correctly apply it; at least, as a general thing." *Hygrade Provision Co. v. Sherman*, 266 U.S. 497, 502, 45 S. Ct. 141, ___, 69 L. Ed. 402, 407 (1925). Similarly, in discussing the validity of the New York statute, one court noted that:

> [i]t is manifest, however, that the Legislature did not intend to use the word "kosher" in an indefinite sense, but evidently in the ordinary sense in which it is used in the trade, which is to designate meat as having been prepared under and of a product sanctioned by said religious requirements, and, therefore, as I view it, the Legislature has itself definitely defined the word "kosher" as used in the statute. This construction leaves the statute sufficiently definite * * *.
>
> [*Atlas, supra*, 170 N.Y.S. at 835-36.]

*See also National Foods, Inc. v. Rubin*, 727 F. Supp. 104, 109 (S.D.N.Y. 1989) (acknowledging long-standing recognition of constitutionality of New York's kosher laws); *People v. Goldberger*, 163 N.Y.S. 663 (Ct. Spec. Sess.

1916) (upholding constitutionality of New York's kosher regulation). Indeed, courts have not refrained from enforcing New York's kosher laws. *See, e.g., Cohen v. Eisenberg*, 19 N.Y.S.2d 678 (Sup. Ct.), *aff'd*, 24 N.Y.S.2d 1004 (App. Div. 1940); *People v. Gordon*, 14 N.Y.S.2d 333 (Ct. Spec. Sess. 1939), *rev'd on other grounds*, 16 N.Y.S.2d 833 (App. Div.), *aff'd*, 28 N.E.2d 717 (N.Y. 1940).

Other courts have similarly recognized that kosher regulations refer to sufficiently definite and secular standards to warrant enforcement. For example, Maryland's highest court recently upheld the validity of Baltimore's city-code provision regulating the sale of kosher foods under Maryland's state constitution, noting that "[f]actors that make particular items fit for consumption under these dietary strictures can be complex, but the overwhelming majority of these laws are well settled and not subject to dispute." *Barghout v. Mayor & City Council*, 600 A.2d 841, 847 (1992); *see also Ehrlich v. Municipal Court*, 360 P.2d 334 (Cal. 1961) (upholding California statute regulating fraud in sale of kosher food as sufficiently definite and referring to generally-recognized laws and customs); *Sossin Systems, Inc. v. City of Miami Beach*, 262 So.2d 28, 30 (Fla. Dist. Ct. App. 1972) (Miami Beach ordinance regulating sale of kosher food does not violate Establishment Clause; rather it "serves to safeguard the observance of [religious] tenets."); 52 A.L.R.3d 959 § 2 (1973) (noting that courts have generally upheld statutes and ordinances prohibiting misrepresentation in marketing of kosher food against various constitutional challenges).

In addition, the wide spectrum of consumers who apparently rely on representations that food products are kosher underscores the diminishing religious nature of the kosher designation. *Cf. Marsh v. Chambers*, 463 U.S. 783,

792, 103 S. Ct. 3330, ___, 77 L. Ed. 2d 1019, 1028 (1983) (recognizing that legislative prayer "has become part of the fabric of our society" in light of unambiguous and unbroken history of use); *McGowan, supra,* 366 U.S. at 431-38, 444, 81 S. Ct. at ___, 6 L. Ed. 2d at 402-06, 410 (considering whether legislation lost its religious character in order to adjudicate constitutionality of Sunday-closing laws); Laurence H. Tribe, *American Constitutional Law*, § 14-15, at 1294 (2d ed. 1988) (noting that "[c]learly, practices can outgrow their religious roots * * * ."). Even if religious in origin, the kosher designation serves an increasingly secular role in our society. Thus, to the extent the New Jersey regulations refer to commercially-recognized and sufficiently-definite standards, they are facially valid and do not enmesh the State in monitoring religious practices.

The majority contends that the religious qualifications of the persons selected to enforce the regulations further evidences their sectarian nature. *Ante* at __ (slip op. at 18). As discussed, *supra* at __ (slip op. at 18-19), the regulations neither require the Chief of the Bureau of Enforcement to be a rabbi nor provide for an Advisory Committee. Thus, unlike either *Larkin v. Grendel's Den*, 459 U.S. 116, 125-27, 103 S. Ct. 505, ___, 74 L. Ed. 297, 306-08 (1982), or *Spacco v. Bridgewater School Dep't*, 722 F. Supp. 834, 844-47 (D. Mass. 1989), the Chief Enforcer and the Committee have not been invested with the authority to determine or control secular matters. Therefore, the regulations, on their face, do not confer impermissible power on religious persons or bodies.

The majority additionally finds that all disputes "would call inescapably on the State to assume a religious role" and "inevitably would entail the application and interpretation of Jewish law." *Ante* at __ (slip op. at 26).

Although instances may arise in which enforcement actions could involve religious principles, perhaps resulting in an "as applied" challenge to the regulations, the majority ignores the practical reality that the vast majority of inspections and enforcement proceedings authorized by the regulations will involve application of only objective standards. Noting that aspect of enforcement of kosher laws, one district court recently rejected a claim that an enforcement action pursuant to New York's kosher statute violated the Establishment Clause precisely because

> [n]o facts are alleged in the amended complaint that suggest a theological dispute or the enforcement of one form of religious orthodoxy over another. Hebrew National's amended complaint alleges no facts showing that the 1987 sanction or the 1989 investigation is based on a theological disagreement. * * * Thus, the facts alleged in the amended complaint do not state a claim of violation of the establishment clause.

[*National Foods, supra*, 727 F. Supp. at 109.]

*See also Korn v. Rabbinical Council*, 195 Cal. Rptr. 910, 914 (Ct. App. 1983) (determining that court has jurisdiction "if, after the application of traditional Judaic law to the facts surrounding the preparation of the specific food in question, Jewish religious authorities do not dispute the characterization of the food as kosher").

Similarly, whether County Kosher violated the regulations in the underlying enforcement action may be resolved for the most part purely by factual determinations, involving no religious disputes whatsoever. For example, the

allegation that County Kosher was storing admittedly non-kosher chicken in its shop can be resolved without any reference to religious doctrine. The record is devoid of evidence to support the conclusion that by enforcing the regulations to identify fraudulent representation of kosher foods, the State necessarily interprets religious law or applies religious principles.

When no religious issues are involved, or when kosher law is settled, the regulations may be enforced by reference to neutral principles of law. *See Jones v. Wolf*, 443 U.S. 595, 602-04, 99 S. Ct. 3020, ___, 61 L. Ed. 2d 775, 784-85 (1979); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-17, 96 S. Ct. 2372, ___, 49 L. Ed. 2d 151, 162-67 (1976); *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449, 89 S. Ct. 601, ___, 21 L. Ed. 2d 658, 665 (1969); *Elmora Hebrew Ctr. v. Fishman*, 125 N.J. 404, 413-16 (1989). As the New York Court of Appeals recognized in a case concerning the enforcement of a Ketubah, a Jewish document that formed the basis for a marriage, the fact that the subject matter of the dispute "[w]as grounded in religious belief and practice does not preclude enforcement of its secular terms." *Avitzur v. Avitzur*, 446 N.E.2d 136, 139, *cert. denied*, 464 U.S. 817, 104 S. Ct. 76, 78 L. Ed. 2d 88 (1983). Similarly, the State may neutrally enforce its consumer-protection laws regarding kosher food in the same manner as the State protects consumers of other goods. Thus, although an "as-applied" challenge to the regulations may be brought when a particular enforcement action raises questions concerning the proper interpretation of kosher law, *Market St. Mission v. Bureau of Rooming and Boarding House Standards*, 110 N.J. 335, 343-44, *appeal dismissed*, 488 U.S. 882, 109 S. Ct. 209, 102 L. Ed. 2d (1988), the regulations are facially valid to the degree that they may be

applied neutrally, without involving the State in religious matters. In assuming that all disputes would entail application of Jewish law, *ante* at ___ (slip op. at 26), the majority remains preoccupied with those isolated, debatable aspects of kosher-food preparation that may be of theoretical interest to religious scholars, but have virtually nothing to do with this facial challenge.

No evidence before us indicates that any of the prongs of the *Lemon* test will necessarily be violated by enforcement of the regulations. Therefore, I cannot agree that the regulations, on their face, violate the Establishment Clause.

III.

Because there is no indication that every enforcement action engenders a First Amendment violation, I find no basis on which to conclude that the regulations are facially invalid. Absent a showing that no unitary kosher standard exists or that the religious disagreements over kashrut are predominant as to arise in each application, the regulations should not be invalidated.

At oral argument, the Attorney General indicated that the regulations were currently undergoing revisions. I would encourage the Attorney General to take advantage of the suggestions presented at oral argument and to consider alternative formulations in order to render the regulations and their enforcement as neutral as possible. On this record, however, I conclude that the regulations have not been shown to be facially invalid.

Justices O'Hern and Garibaldi join in this opinion.

## APPENDIX B

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-5420-88T2

RAN-DAV'S COUNTY KOSHER, INC., a New Jersey Corporation t/a COUNTY KOSHER; ARTHUR WEISMAN and NADINE WEISMAN, individually and as Officers and Shareholders of RAN-DAV'S COUNTY KOSHER, INC.; and NEW JERSEY ALLIANCE OF KOSHER CATERERS,

Plaintiffs-Appellants,

v.

STATE OF NEW JERSEY; PETER N. PERRETTI, JR.; JAMES J. BARRY, JR.; RABBI YAKOV M. DOMBROFF; ATTORNEY GENERAL'S ADVISORY COUNCIL ON KOSHER FOOD; MORRIS GLATT; DIANE LaMONACO; and DOES 1-50,

Defendants-Respondents. [1]

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[1] We have used the caption employed by the parties in the notice of appeal. As procedural history will show, the caption should have remained as in the original suit instituted by the Attorney General's Office.

Argued: June 13, 1990 Decided: AUG 06 1990

Before Judges Dreier, Scalera and D'Annunzio.

On appeal from the Superior Court of New Jersey, Chancery Division, Union County.

Eric L. Chase argued the cause for appellants (Margolis Chase, attorneys, Mr. Chase and Genevieve K. LaRobardier on the brief; Laurence H. Tribe and Brian Koukoutchos, on the Supplemental brief).

John T. Ambrosio, Depuy Attorney General argued the cause for respondents (Robert Del Tufo, Attorney General of New Jersey, Andrew M. Silkowitz, Assistant Attorney General, of counsel; Mr. Ambrosio and Nancy Costello Miller, on the brief).

Nathan Lewin argued the cause *amicus curiae* for the National Jewish Commission on Law and Public Affairs (Dennis Rapps, attorney; Barbara L. Newman, on the brief).

Bruce D. Shoulson argued the cause *amicus curiae* for The New Jersey Association of Reform Rabbis, The Reconstructionist Rabbinical Association, The New Jersey Region of the Rabbinical Assembly, and The Rabbinical Council of New Jersey (Lowenstein, Sandler, Kohl, Fisher & Boylan, attorneys; Walter A. Effross, on the brief).

Ronald K. Chen argued the cause *amicus curiae* for the American Civil Liberties Union of New Jersey (Deborah Ellis, of counsel and on the brief).

Meyer L. Rosenthal argued the cause *amicus curiae* for the Anti-Defamation League of B'nai B'rith (Richard F. Shevitz, attorney; Mr. Rosenthal, on the brief).

Ronna D. Brown, Assistant Attorney General argued the cause *amicus curiae* for the Bureau of Consumer Fraud and Protection of the State of New York (Robert Abrams Attorney General of the State of New York, attorney; John W. Corwin, Assistant Attorney General, in charge, Mary Hilgeman, Ms. Brown and Earl S. Roberts, of counsel; Mr. Abrams, on the brief).

The opinion of the court was delivered by DREIER, J.A.D.

After the dismissal of various claims in the Chancery Division, appellants Ran-Dav's County Kosher, Inc. and its principals (plaintiffs) here present a challenge to N.J.A.C. 13:45A-21.1 *et seq.*, the New Jersey Kosher regulations. Plaintiffs have also challenged the parallel disorderly persons statute, N.J.S.A. 2C:21-7.2 *et seq.*; but since plaintiffs have not been charged with a violation of the disorderly persons statute, they have no basis for a direct attack in this proceeding. [2]

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[2] In their attempt to challenge N.J.S.A. 2C:21-7.2 *et seq.*, plaintiffs requested a declaration that the Kosher violations sections of the disorderly persons statute were invalid. Procedurally, the trial court dismissed the claim, and we previously denied leave to appeal that dismissal. We now sustain the trial court's dismissal of this portion of the counterclaim. Plaintiffs' reliance on R. 2:10-5 is misplaced. That rule provides only that we "may exercise such original jurisdiction as is necessary to the complete determination of any matter on review." It is

The action commenced when the Attorney General filed a complaint against plaintiffs, Ran-Dav's County Kosher, Inc. and Arthur Weisman, one of Ran-Dav's principals, alleging various violations of the Kosher food requirements set forth in the challenged regulations. These included possession of certain "Shelat" chicken breasts (determined to be non-Kosher by an out-of-state authority), and various specifications of the improper handling or packaging of purportedly Kosher meats. At the State's request, the Chancery Division entered an order requiring Ran-Dav's and Weisman to show cause why Ran-Dav's should not be preliminarily enjoined from holding itself out as an establishment selling Kosher food.

Defendants answered each allegation of the complaint. They defended in part by claiming that the regulations were unconstitutional, and by demanding an injunction against their enforcement. Ran-Dav's and Weisman obtained their own order directing the Attorney General to show cause why he should not be restrained from enforcing the regulations. They then filed counterclaims seeking a declaration of unconstitutionality, an injunction against enforcement, and damages suffered as a result of the enforcement of the regulations and allegedly defamatory press releases. The Attorney General moved to dismiss these counterclaims.

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not necessary for us to review the disorderly persons sections in order to pass upon the constitutionality of the Kosher regulations. We are aware, however, that our decision concerning the constitutionality of N.J.A.C. 13:45A-21.1 *et seq.* could have a substantial *stare decisis* effect concerning the disorderly persons statute; but any explicit decision concerning the statute must await the proper case. Any references to the criminal statute therefore, shall be for informational purposes only.

The trial judge denied the Attorney General's application for summary relief and both parties' applications for preliminary injunctions. Although jurisdiction of the enforcement actions was retained, the Chancery judge determined that the challenge to the regulations was properly a matter to be heard by the Appellate Division. The counterclaim was thus dismissed, [3] and this appeal was taken.

Plaintiffs (hereafter referred to as "County Kosher" or "Weisman") are the owners and operators of a Kosher food business in Linden. As such, they are subject to regulation both privately, through religious rabbinical supervision provided by Rabbi Harry Cohen of New York, and civilly, by the State's Bureau of Kosher Enforcement in the Division of Community Affairs, directed by its Chief, Rabbi Yakov M. Dombroff.

The regulations' basic operative provision declares it to be "an unlawful consumer practice" to sell or attempt to sell food "which is falsely represented to be Kosher." N.J.A.C. 13:45A-21.2. They are designed to insure that

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[3] The correct procedure was not a dismissal, but rather a transfer of the action to the Appellate Division pursuant to R 1:13-4(a). There is even a question whether the trial judge was required to transfer this action at all. *See State v. Barcheski*, 181 N.J. Super. 34, 37-38 (App. Div. 1981). However, the attacks on the facial validity of the regulations are on a legal basis only. They do not require the development of a factual record, and the matter has been fully briefed and argued before this court. Furthermore, since it is clear that either way the trial judge had determined the issue, an appeal would have been taken, it serves no principle of judicial economy for us to remand the matter for an initial determination of the legal issues by a trial judge. We therefore will accept and determine the issues before us as if the challenged claims had been transferred to this court.

food represented to be "Kosher" is in fact "Kosher." The challenged regulations define "Kosher" as food "prepared and maintained in strict compliance with the laws and customs of the Orthodox Jewish religion." N.J.A.C. 13:45A-21.1. [4] "Kosher-style" or similar words are defined in the regulations as meaning, *inter alia*, a non-Kosher food or product that simulates the taste, appearance and/or consistency of a Kosher food or product but "which has not been prepared or maintained in strict compliance with the laws and customs which are generally recognized as being among the Orthodox Jewish religious requirements." Such "Orthodox Jewish religious requirements" are nowhere spelled out with respect to stores which sell solely Kosher products. [5]

Plaintiffs' principal claim is that the regulations violate the Establishment Clause of the First Amendment of the United States Constitution ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"), and the coordinate provision of the N.J. Const. (1947), Art. I, par. 4 ("There shall be no establishment of one religious sect in preference to another. . . ."). Plaintiffs assert that so long as they have conformed to the Kosher standards established by their supervising rabbi, the State is without authority to establish

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[4] The parallel disorderly person's statute defines "Kosher" as "prepared under and maintained in strict compliance with the laws and customs of the Orthodox Jewish religion. . . ." N.J.S.A. 2C:21-7.2d.

[5] Although the regulations, in general, simply incorporate the laws and customs of the Orthodox Jewish religion, where both Kosher and non-Kosher products are sold, N.J.A.C. 13:45A-21.3 established detailed requirements for display and handling, washing and deveining, and exterior signs; it also spells out in some detail the ways in which food or food products must be handled in order to *retain* their Kosher designation.

different religious standards to which plaintiffs must conform.

The State contends that the Jewish Kosher standards are recognized with little dissent by all branches of Judaism as being those developed and codified in the Orthodox tradition, and that by holding itself out as a purveyor of Kosher food, County Kosher represents to the public that it conforms to these standards. If it does not, the State has an obligation to protect consumers from such misrepresentation, and therefore the Kosher regulations have a valid secular purpose. [6]

In order to enforce the regulations, the Attorney General has created the Bureau of Kosher Enforcement within the Division of Consumer Affairs. Its present chief is a rabbi, Rabbi Dombroff, who employs several inspectors on his staff. The inspectors are not rabbis, and some are not even Jewish. We have been advised that the former chief was not a rabbi. In addition, the Attorney General promulgated Executive Directive No. 1987-2 creating a "State Kosher Advisory Committee." The Committee

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[6] We note an additional consumer protection statute, N.J.S.A. 56:8-2.10, concerning the misrepresentation of food or food products in a restaurant where food has been misidentified or fails to meet a standard of quality established by custom and usage. *And see* the Consumer Fraud Act, N.J.S.A. 56:8-2, declaring as an unlawful practice

> any unconscionable commercial practice, disception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise.

consists of ten members appointed by the Attorney General, and its task is to "advise the Attorney General on Kosher matters and enforcement of the New Jersey Kosher regulations . . . and make recommendations for regulatory changes." We are advised that all of the committee members are rabbis, one Conservative and the rest Orthodox.

As to the meaning of the word "Kosher," "[t]he Hebrew term is kashrut, which . . . [means] "fit" or "proper." The word appears in the Bible only three times . . . and even then not in connection with food." *Encyclopedia Judaica*, Vol. 6 at p. 26. Herman Wouk in his biographic/philosophical work, *This is My God* (Doubleday & Company, Inc. 1961) at pp. 130-131 writes:

> The concept [of Kosher] is in all truth a hard one to pin down. "Kosher" is a late Hebrew word that does not occur in the books of Moses. Perhaps the nearest English word is "fit," in the sense of proper or suitable. But the fitness, it must be clear, is mostly ceremonial. Kosher preparation of food does result in a high degree of hygienic fitness. But a hog could be raised in an incubator on antibiotics, bathed daily, slaughtered in a hospital operating room, and its carcass sterilized by ultra-violet rays, without rendering kosher the pork chops that it yields.

For an understanding of the State's and plaintiffs' respective claims, we must briefly explain some of the basic laws of *Kashrut*, apparently accepted by all parties in this case. After doing so, we will also briefly describe the specific allegations against plaintiffs.

Although the word "Kosher" may not originally have applied to food or diet, for hundreds of years it has been understood to refer at least in part to the system of Jewish dietary laws. [7] Those laws set forth the rules of "(1) permitted and forbidden animals, (2) forbidden parts of otherwise permitted animals, (3) the method of slaughtering and preparing permitted animals, (4) forbidden food mixtures, and (5) proportions of food mixtures prohibited *ab initio* but permitted *ex post facto*." *Encyclopedia of Religion*, Volume VIII, p. 270-271 (MacMillan Publishing Company 1987). *Encyclopedia Judaica* states that "[t]he dietary laws are exceedingly complex and a great deal of material in the Talmud [8] is devoted to them." *Id.* at 40. The historical development of the religious laws of Kosher appears to have

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[7] There are other "Kosher" regulations, *e.g.*, concerning the mixing of fabrics in the fashioning of clothing.

[8] The Talmud is a collection of the oral supplement to the Torah (first five books of the Bible), believed to have been given to Moses at Mt. Sinai; commentaries thereon nearly two thousand years old (compiled in the fourth and fifth century); and commentaries on the commentaries over the ensuing centuries. The form is often disputational, with unresolved contrary opinions stated by various rabbis. Horowitz, *The Spirit of Jewish Law*, (Bloch Publishing Co. 1953) at pp. 36-39. The Talmud includes both law ("*Halakah*") and story ("*Hagadah*"). In the 12th century the obscure Talmudic law, "*Halakah*," was codified by Maimonidies in the *Mishneh Torah*, followed in the 16th century by Rabbi Joseph Karo's codification of law and practice, the *Shulhan'Aruk*, and Rabbi Moses Isserles' adaptation of that work to Northern European practices. The codes are supplemented by "responsa," or rulings by rabbinic sages through the centuries. *Id.* at 40-41. It is this body of material (greatly simplified for this discussion), that provides the principal source of modern-day decisions on Orthodox and Conservative (and even some Reform and Reconstructionist) Jewish practices. Thus the law of Kosher, although derived originally from biblical statute, has been developed through rabbinic legislation and custom.

led to unaniminity (or at least near unaniminity) of opinion as to whether the majority of food and food preparations encountered in modern, everyday life are Kosher. There are, however, ongoing disputes over a variety of foods. Certain fish, [9] birds, hard cheeses, and wines are accepted by the Conservative movement and a few Orthodox scholars, but rejected by the majority of the observant Orthodox. The Reform and Reconstructionist movements have institutionally not taken a position on the Kosher nature of particular food, since such ritual observance is not required and is left to individual choice.

The laws relating to the ritual slaughter of meat are "[s]o complex and minute . . . that the slaughter must be carried out by a carefully trained and licensed *shohet*." (*Encyclopaedia Judaica*, *supra*, at p. 28). Compliance with the rules "is highly labor intensive" and causes the price of Kosher food to be "consistently higher" than its non-Kosher counterparts." ("Shopping Guide for the Kosher Consumer," published by the New York State Consumer Protection Board). Also, the laws concerning preparation of meat are detailed. Meat requires "Koshering" to draw out all blood, since the consumption of blood is forbidden in the Bible. (Lev. 7:26-27; 17:10-14). Meat must be soaked and salted (the timing of the salting process and the texture of the salt is specified), and then left to stand, followed by additional

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[9] For instance, there is an ongoing dispute as to whether swordfish is Kosher. The basic rule is that fish with at least two scales and one fin are Kosher. Some scholars are of the opinion that only the "sailfish," not the "swordfish," has scales and is therefore Kosher. On the other hand, other authorities, after consulting with the United States Bureau of Fisheries, are of the opinion that even a true swordfish is Kosher because it has scales when it is young but sheds them upon reaching a certain size. Similar problems relate to sturgeon.

washings. If more than 72 hours had elapsed since slaughter, the blood can be removed only by roasting over an open flame. (*Encyclopaedia Judaica, supra*, at p. 28).

The investigators employed by the Bureau of Kosher Enforcement in the Division of Community Affairs inspected plaintiffs' place of business on five occasions and noted specific violations. The first alleged violation involved the deveining of calf tongues. The inspector found calves' tongues in a brine solution in a refrigerator. Plaintiffs contended that 25 to 30 tongues were being cleansed in a mild brine solution prior to deveining and prior to pickeling by injection of full-strength brine. The inspector contended that there were even a larger number of tongues in a metal container, and that they were already in a full-strength brine solution without having been deveined. Both parties agree that deveining was required, and the State agrees that pre-soaking in a mild brine solution, if acceptable to the establishment's supervising rabbi, would not be a basis for a violation notice.

The second charge involved the presence of Shelat brand boned chicken breasts, six boxes of which were found in the bottom of a storage freezer. Plaintiffs had been notified that certain Shelat products were no longer considered Kosher as a result of out-of-state inspections. Plaintiffs contended that these boxes were merely being held for return to the supplier. [10]

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[10] Plaintiffs have asserted a due process violation as a result of this alleged violation. The presumptive evidence that an establishment intends to sell non-Kosher food if non-Kosher food is found on the premises (N.J.A.C. 13:45A-21.6), is valid. While plaintiffs contend that the presumption is "arbitrary, unreasonable and conclusive," they are incorrect. The presumption has a rational connection between the proved

The third problem, which the State claims occurred on two dates, involved finding blood and a vein in meat to be ground for hamburger. Plaintiffs explained that the meat was defrosting and had not yet been trimmed to remove any veins or blood. Only then would it be ground.

The next problem involved labeling. The inspector found approximately 10 packages (out of 1,750 packages) with labels showing the meat had been packaged prior to the 72 hour period required for rewashing. Plaintiffs contended that some of the packages had been sold earlier, but the customer had not yet picked them up. Insofar as the packages contained veal, the veal labeling and dating machine was broken, and was incorrectly labeling the packages. The balance of the items were prepackaged Kosher briskets purchased from a third party so that the labeling was irrelevant. [11]

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fact and the presumed fact. But "the presumption may not be accorded mandatory effect." *State v. Ingram*, 98 N.J. 489, 498 (1985). All presumptions are rebuttable under Evid. R. 13 and 14. Although there is a defense that a defendant relied upon representations made by its supplier or manufacturer, N.J.A.C. 13:45A-21.7, there is nothing to indicate that this defense is exclusive. Certainly, any factual defense such as that raised by defendant (that the chickens were merely being held for return to the supplier) may be heard by the court.

[11] Plaintiffs further note a problem with the inspector's report of March 10, 1988. One of the charges involved 100 packages of raw meat allegedly not properly labeled, but they were not reported in the investigator's records of that date and only were added to the inspector's certification 13 months later. Plaintiffs assert that any lack of labeling at that time was due to the breakdown of the labeling machine, and noted that even if 100 packages were involved, there were over 2,000 packages in the case, all properly labeled.

As can be seen, the issue in the parallel enforcement proceedings do not involve doctrinal disputes concerning interpretations of Jewish law to determine what is Kosher. What is involved is akin to a claim by the State of fraud or mistake and denials by plaintiffs. For example, if plaintiffs, knowing that the Shelat chickens were not Kosher, were holding them for sale to consumers, such actions would have justified a claim of consumer fraud, irrespective of any variant interpretations of what is Kosher. Similarly, if the untrimmed meat, complete with veins and blood, was either intentionally or negligently to be thrown into the grinder, even plaintiffs do not contend that the resultant product would have been properly labeled. They claim, however, that the inspector failed to recognize that this meat was being held to be trimmed, not to be ground.

Yet plaintiffs still challenge the regulations. They claim that the Kosher determination is to be made by their supervising rabbi [12] and, since the determination is solely a matter of interpretation of religious law, the State may not adopt or establish a religious standard further to assess their actions. Especially, the State may not adopt what it considers to be a singular "Orthodox Jewish" standard. Since it is clear that the State's specific claims of violations do not implicate a challenge to plaintiff's supervising rabbi's interpretation of "what is Kosher," plaintiffs challenge to the regulations must be viewed as facial.

We can consider this attack in several ways. The State suggests we employ a test under which we would be required to uphold the regulation unless we find that "no set

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[12] Plaintiffs' supervising rabbi allegedly inspects at least twice a week at unannounced different times. He found no deficiencies in plaintiffs' practices.

of circumstances exists under which the [regulations] would be valid." *Webster v. Reproductive Health Services*, 492 U.S. ___, ___, 109 S.Ct. 3040, 106 L.Ed.2d 410, 439 (1989) (O'Connor, J., concurring). We disagree with the test suggested by the State; although the State claims facial validity applying the *Webster* standard, we note that Justice O'Connor herself stated that this standard is inapplicable in the "context of the First Amendment." 492 U.S. at ___, 109 S.Ct. at ___, 106 L.Ed.2d at 440. Since the regulations clearly could prohibit the sale of pork, or chickens not slaughtered in accordance with any semblance of adherence to religious practices, deceptively mislabeled "Kosher," the law at least some facial validity. *Hygrade Provision Co. v. Sherman*, 266 U.S. 497, 45 S.Ct. 141, 69 L.Ed. 402 (1925). [13]

Plaintiffs present the mirror image of the State's argument. They contend that since there are conceivable circumstances under which the regulations cannot constitutionally be applied, they should be overturned by this court. If "the enactment reaches a substantial amount of constitutionally protected conduct," it is overbroad. *Town Tobacconist v. Kimmelman*, 94 N.J. 85, 98 (1983), quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-495, 102 S.Ct. 1186, 71 L.Ed.2d 362, 369 (1982). Plaintiffs' argument also implicates the consideration of vagueness. If the phrase "prepared and maintained in strict compliance with the laws and customs of the Orthodox Jewish religion," establishes a standard that is

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[13] We note, as does the dissent here, that *Hygrade* does not represent an establishment clause challenge. Rather it was a due process, equal protection, and commerce clause case. While many of the issues such as, overbreadth, vagueness and governmental interest are the same, we will consider the religious aspects separately.

not readily determinable, there might be a valid challenge to the clarity of the regulations.

The Attorney General has met plaintiffs overbreadth and vagueness claims by acknowledging in his brief

> that, where Orthodox Jewish authorities dispute the force or requirement of a particular definition of kosher, the State is precluded from choosing one interpretation over the other.

The Attorney General thus concedes that this court should construe the regulations "to avoid questions of religious entanglement," and agrees that the regulations are not violated where there is a dispute among accepted Orthodox Jewish authorities and the seller has complied with either interpretation. At oral argument we carefully explored this contention. The Attorney General (over the objections of the *amici curiae* who had otherwise argued in favor of the State's position) explicitly conceded that the phrase "strict compliance with the laws and customs of the Orthodox Jewish religion" is construed by the Attorney General's office as validating any bonafide or sincerely held belief by the purveyor that the item was in fact Kosher. [14] It is actually

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[14] At oral argument we pressed the Attorney General to determine what was meant by this concession. We inquired whether if a Orthodox rabbi by study of religious authorities determined that modern slaughtering methods were less painful than the traditionally approved methods of slaughter, and advised the butcher that the meat of the animal so killed was in fact Kosher, the State would take no action. We even followed the point to the ultimate (and possibly absurd) question of whether a declaration by such a rabbi that pork was Kosher would be honored by the State. In both instances the response was that if the determinations were bonafide, and the dispute thus a religious one, the State would

somewhat disingenuous for plaintiffs to say that "Kosher" is an indefinite term. They hold themselves out to the community as purveyors of "Kosher" food. They know that their many customers rely upon them and their supervising rabbi to be knowledgeable concerning the various requirements to designate their products as "Kosher" within the generally-accepted meaning of the word. *See Hygrade Provision Co. v. Sherman, supra*, 497 U.S. at 501-502, ___ S.Ct. ___, 69 L.Ed. at 407.

We accept the State's interpretation as reflecting the enforcement policy in effect, and will later explore the question of whether this interpretation removes any question of religious entanglement from the enforcement of these regulations. We first, however, will treat the arguments of the *amici* who, after hearing the State's concessions, departed from their concurrence with the State over this issue. Since these regulations are aimed at consumer protection, their principal concern was that the consumer expects that the products will conform to a generally-accepted standard of Kosher, not a private standard determined by a single variant rabbi. This argument has some facial merit, but it also contains the element of its refutation. As will be discussed, and as the State has wisely noted, consumer protection in this instance is to be balanced against the possible excessive entanglement of the State in a religious determination. As soon as the State injects itself into determining what is the commonly-held standard of Kosher, it determines what

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accept the variant interpretation. The Attorney General was quick to point out that the greater the variance from accepted standards, the less likely it would be that the State would accept that the belief was sincerely held, and the issue might have to be tried. But there would be no *ipso facto* rejection, and the real issue would be the bonafide nature of the belief.

essentially is a religious issue. It is not enough to say that the religious protection is for the potential buyer only. It is as much a religious issue for the party selling the product (who has a right to a livelihood which may include the sale of Kosher products, so long as he does not intentionally or negligently defraud the public), as it is for the consumer who wishes to purchase a Kosher product.

We recognize that there are basically three groups who purchase Kosher products. First, there are the observant Jews who wish to comply with their religion. Second, there are members of other religions or persons with health problems who rely upon the fact that the commonly-known bases of the Kosher designation will be observed. For example, Moslems buy Kosher products because they know that they will not contain pork products; people with shellfish allergies can buy Kosher products because they know that shellfish are not Kosher. Lastly, there are members of the general public who have a notion that the Kosher processes of meat preparation are under closer scrutiny than are those of the general producer, since they are supervised by State and federal health authorities as well as rabbinic personnel. In fact, general advertisement for some Kosher products speak of the greater care taken in preparation of Kosher meats because of responsibility to "a Higher Authority." Even though we acknowledge some market created by the second two groups of customers, the primary market, at least for non-mass-produced items, is comprised of observant Jews. If a supplier's practices diverge from the norm, there are immediate bulletins issued by various congregations, news services, magazines and the like to inform observant Jews that a particular manufacturer's products are questionable. Most suppliers would not risk such deviation for fear of losing this substantial market. While there is the remote possibility of an outlandish

enforcement ruling ("Kosher" pork), its regulation should be left to the later case in which it may arise.

The second self-regulating factor is the presence of large certifying organizations who inspect in addition to the particular supervising rabbi, or out of respect for the supervising rabbi on the basis of his certification, will endorse the product as conforming to religious standards. In addition to a simple letter "K" which merely notes some Kosher supervision, there are at least eight other copyrighted symbols to show supervision. [15]

The consuming public is thus not left at a loss. Between the diligence of local congregations and their rabbis, and the national or regional agencies that supervise compliance, the State's regulatory acceptance of a good faith divergence from the Kosher norm, with its attendant publicity, is unlikely to have any great effect. The sale of Kosher products is largely self-regulated within the community.

If we accept the State's interpretation of the "strict compliance with laws and customs of the Orthodox Jewish religion" as permitting strict compliance with any sincerely held interpretation of the laws and customs of the Orthodox Jewish religion, we then must determine whether this

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[15] The most common of these, an "O" with a "U" at the center is the symbol of the joint Kashruth Commission of the Union of Orthodox Jewish Congregations of America. Others include various symbols used by the Kosher Supervision Service; Organized Kashruth Laboratories; Vaad Harabonim; Ko Kosher Service; Kosher Overseers Association of America; Council of Orthodox Rabbis; and Vaad Ha'ir of Montreal. Other symbols are used to show that the product is Kosher for Passover, and still other designations appear on wine.

interpretation violates the First Amendment to the United States Constitution or N.J. Const. (1947), Art. I, par. 4. The Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 612-613, 91 S.Ct. 2105, 29 L.Ed.2d 745, 755 (1971), established a three-pronged test to determine whether a challenged activity violates the religion clauses of the First Amendment. All of the parties concede that this test is applicable to the issues before us. However, the ACLU in its *amicus* brief suggests that the express adoption in the New Jersey Kosher regulations of the laws and customs of the "Orthodox Jewish religion" constitutes a *per se* violation of the United States and New Jersey Constitutions. The ACLU argues from *Larson v. Valente*, 456 U.S. 228, 102 S.Ct. 1673, 72 L.Ed. 2d 33 (1902), and *Hernandez v. Commissioner*, 490 U.S. ___, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989), that the mere expression of the denominational preference is dispositive of the issue. The Supreme Court stated in *Hernandez* that

> when it is claimed that a denominational preference exists, the initial inquiry is whether the law facially differentiates among religions.

Also,

> If no such facial preference exists, we proceed to apply the customary three-pronged . . . inquiry derived from *Lemon*. [104 L.Ed.2d at 784].

Where a standard is not religious, the State may establish it; but where a standard is solely one of religious law, the State may not prefer one religious interpretation over another. *Tudor v. Bd. of Education, Rutherford*, 14 N.J. 31, 44 (1953), *cert. den. sub nom. Gideons*

*International v. Tudor*, 348 U.S. 816, 99 L.Ed. 644, 75 S.Ct. 25 (1954). If each of the branches of Judaism had different Kosher standards and the regulation adopted the Orthodox standards, the ACLU's position would have been well taken. As noted earlier, however, the Reform and Reconstructionist branches have no Kosher requirements, and leave adherence to those who wish to be observant of the Kosher laws. The standard, according to the brief and arguments of the rabbinical association of all four branches of Judaism, is the Orthodox formulation.

Some Conservative and some divergent Orthodox interpretations do present small variations from the mainstream, but they do not pretend to be adopting different standards; they merely advance their interpretations of the same Orthodox standards. Thus, if one of these groups advocates that pheasant and swordfish are Kosher, or that caviar (as the roe of sturgeon) may be eaten, they do so by first applying the Orthodox standards, and then interpreting them differently. If the State attempted to hold these groups to the majority Orthodox interpretation, we might have some disagreement; but since the State has conceded far more than would be required to support these minor variations, we see no basis for a *Larson/Hernandez* attack.

The three part *Lemon v. Kurtzman* test states:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . . finally, the statute must not foster 'an excessive government entanglement with religion.' [403 U.S. at 612-613, 91 S.Ct. at ___, 29 L.Ed.2d at 755; quoting from *Walz v. Tax*

*Commission*, 397 U.S. 664, 674, 25 L.Ed.2d 697, 704, 90 S.Ct. 1409, ___ (1970)].

These tests have been applied to First Amendment religion cases from the time they were announced in 1971 to date. *See, e.g., Board of Education, Westside Community Schools v. Mergens*, ___ U.S. ___, 110 S.Ct. 2356, ___, L.Ed.2d ___, (1990). We will examine each aspect.

First, it is clear that there is a secular legislative purpose, *viz*, the protection against intentional and negligent misrepresentation in the sale of Kosher food. Given the various reasons discussed earlier for the purchase of Kosher foods, and the tremendous profit that could be made by palming off non-Kosher food as Kosher, the secular purpose test is met. The purpose of these regulations is not merely "to endorse or disapprove of religion." *Wallace v. Jaffree*, 472 U.S. 38, 56, 105 S.Ct. 2479, 86 L.Ed.2d 29, 43 (1985) (overturning Alabama's period of silence statute, because the legislative history demonstrated that there was no secular purpose and that it was intended to return prayer to the classroom). The fact that the Kosher statute coincides with religious beliefs and "incidentally" benefits religious organizations is not enough to outweigh the regulations' compliance with the secular purpose prong of the *Lemon* tests. *See Widmar v. Vincent*, 454 U.S. 263, 273-274, 102 S.Ct. 269, 70 L.Ed.2d 440, 450 (1981). In fact, the regulations themselves note that the purpose of the regulation was to "protect the consumer who, for reasons of religion, conscience, quality or health, intends to purchase Kosher foods." 16 N.J.R. 220(a) (1984).

Even if we were to consider that the primary purpose is to protect observant Jewish consumers, it is clear that this regulation is not one to establish religion, but rather to

accommodate those who are practicing their religion. This distinction was made clear in *Jones v. Butz*, 374 F.Supp. 1284 (S.D.N.Y. 1974), *aff'd* 419 U.S. 806, 95 S.Ct. 22, 42 L.Ed.2d 36 (1974), where the court upheld the exception for Kosher slaughterers from the general requirements of the Humane Slaughter Act. *And see Zorach v. Clauson*, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1952), upholding a New York "released time" statute permitting public schools to release students to "go to religious centers for religious instruction or devotional exercises." Justice Douglas there noted that Church and State need not be "aliens" to each other, but only that there shall not be a "dependency one on the other." 345 U.S. at 312, 72 S.Ct. at ___, 96 L.Ed. at 961. Similarly, in *Board of Education Westside, Community Schools v. Mergens, supra*, the Supreme Court noted that government may accommodate religious groups to permit meetings in schools provided they are not a subterfuge for the establishment of any particular religion.

In the case before us, if observant Jews' access to Kosher food requires special protection against fraud, the State can accommodate religion and provide such protection. As was stated in *Zorach v. Clauson*, involving the released time statute, the State could properly respect "the religious nature of our people and accommodates the public service to their spiritual needs." 343 U.S. at 314, 72 S.Ct. at __, 96 L.Ed. at 962. [16] Here, there is no enforcement of the

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[16] We do not, as urged by plaintiffs, read *May v. Cooperman*, 780 F.2d 240, 252-253 (3rd Cir. 1985), appeal dismissed 484 U.S. 72, 108 S.Ct. 388, 98 L.Ed.2d 327 (1987), as rejecting the entire line of accommodation cases. *May*'s reliance upon *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 105 S.Ct. 2914, 86 L.Ed.2d 557 (1985), appears limited to the issue, not of accommodation of religion, but the lack of a secular purpose. While *Thornton* is a difficult case (an employee's

observance of the Kosher regulations by any person, nor is there any significant burden placed upon the non-observant. The prevention of fraud to any segment of the population, however, defined, benefits all.

The second prong of the *Lemon* test requires that the regulations principal or primary effect must neither advance nor inhibit religion. The parties and *amici* have not urged a violation of this prong of the test. We only note that New York's 75-year experience with a similar statute has shown no unwarranted effect, either in establishing religion in general, or Orthodox Judaism in particular. [17]

The principal *Lemon* issue is whether the Kosher regulations foster an excessive government entanglement with religion. Historically, as noted in *Tribe, American Constitutional Law*, (1978) §14-3 at 816-817, Roger Williams was concerned about the State corrupting religion; Thomas Jefferson was concerned about protecting the State from religion, and therefore advocated the strictest wall of separation; and James Madison saw both Church and State as

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absolute right to decline work on his or her Sabbath), we read the case as refusing to establish a preference for Sabbath observers, and thus not an attack on the accommodation approach of *Zorach*. The recent explicit return to the accommodation analysis in *Board of Education, Westside Community Schools, supra*, buttresses this analysis.

[17] The *amicus* brief and argument by the Attorney General of New York confirms that in the 75 years of regulation by the New York Authorities, no cases have come to light of any great variance in the interpretation of what was religiously Kosher, so that regulatory judicial hearings were needed to determine what was religiously acceptable. The cases which have arisen have been enforcement actions such as the one before us in which the issues were factual, and required no interpretation of Jewish law.

posing mutual threats, with experience showing that the State, as in the England of his day, could permit one sect to gain control over others. Plaintiffs and the ACLU draw on this background and assert that the regulations before us permit courts to resolve disputes over sincerely held religious beliefs. Historically, New Jersey courts have abstained from such decisions. *See Chavis v. Rowe*, 93 N.J. 103, 109-110 (1983). *And see Tudor v. Bd. of Education, Rutherford, supra*, 14 N.J. at 36-44, where Chief Justice Vanderbilt traced the history of the American doctrine of the separation of Church and State. He also noted the concurrence of the New Jersey constitutional provisions with the First Amendment to the Federal Constitution. *Id.* at 44.

Plaintiffs contend that since the regulations are now enforced by an Orthodox Jewish rabbi, and the regulations are interpreted by an Advisory Council consisting of all Orthodox rabbis (except for one Conservative member), the regulations are unconstitutional. They rely upon *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 103 S.Ct. 505, 74 L.Ed.2d 297 (1982), which we find has no application to the matter before us. There a zoning statute permitted church governing bodies to veto liquor license applications. The statute was overturned, since government may not delegate its decision-making function to a religious body. 459 U.S. at 127, 103 S.Ct. at ___, 74 L.Ed.2d at 307. *And see Spacco v. Bridgewater School Dept.*, 722 F.Supp. 834 (D. Mass. 1989), where the lessor-church was given the power to influence elementary school curriculum in space leased from its parish center.

In the case before us, however, Rabbi Dombroff does not hold his office by virtue of his rabbinical training or ordination. He is a State employee. Whatever may be his personal beliefs concerning what is or is not religiously

proper Kosher practice, according to the State he may not reject any practice which is supported by the sincerely held belief of the purveyor that the product is Kosher. The State thus has not delegated to Rabbi Dombroff or the Advisory Council the power to determine what is or is not religiously Kosher. By virtue of Rabbi Dombroff's training, however, he is able to determine what the norm is and, as noted earlier, there are few disputes concerning what is or is not Kosher. The issues he faces involve whether acknowledged Kosher requirements have in fact been met. [18] We see no basis here for plaintiffs' apprehension that the Orthodox establishment is here attempting to use the State to wage sectarian warfare. The State may not use it powers to punish

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[18] Some of the *amici* who have argued in favor of the regulations contend that the reference to Jewish law is little different from reference to the law of a foreign country. The issue is not so simple. If a regulation permitted some action in New Jersey only if it was legal in France, and thus the state of French law was an issue of fact to be determined, the courts would be competent to perform this function. But the constitutional restrictions on religious entanglement prohibit the courts from making just such an adjudication of Jewish law. We need not resolve this aspect of the argument, however, given the State's explicit disclaimer noted earlier. The apposite side of this issue is exemplified by *Cabinet v. Shapiro*, 17 N.J. Super. 540 (Law Div. 1952), where the question of what was or was not "Kosher" was implicated in a libel action and the court states that an acknowledged Kosher standard could be recognized by a court.

> We do not have the right and the jurisdiction to determine a matter in violation of civil and property rights of a citizen even though such rights involve the fundamental concepts and dogma of the Hebrew religion and law [at 547].

a person who merely has religious doctrinal disagreements with any established religion. [19]

Plaintiffs also contend that if the regulations are upheld, the Attorney General or the courts will be drawn into resolving religious disputes. We disagree. We state clearly and unequivocally that the State cannot and will not resolve whether any person's religious tenet is true, or even whether it is correct within the bounds of the person's own organized religion. These issues are left for religious determination, if an acceptable forum exists to determine the issue. The forum, however, is not supplied by the State except in the most unusual circumstances. *Hardwick v. First Baptist Church of Perth Amboy*, 217 N.J. Super. 85, 91-93 (App. Div. 1987).

Under the State's broad interpretation of the regulations, the only remaining issue would be whether the variant practice was supported by the purveyor's good faith belief that the item complied with the Kosher laws. Such an interpretation would not run afoul of *United States v. Ballard*, 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148 (1944), where Justice Douglas reiterated that "'[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.'" 322 U.S. at 86, 64 S.Ct. at ___, 88 L.Ed. at 1153. (quoting from *Watson v. Jones*, 13 Wall. (U.S.) 679, 728, 20 L.Ed. 666, 676). Justice Jackson's dissent in *Ballard* gives us some pause. There he argued that the indictment should have been dismissed because he did not

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[19] Plaintiffs have implied that the real cause of their problems is a jurisdictional dispute between their supervising rabbi, who is centered in New York, and local Orthodox authorities who have urged plaintiffs to be supervised by an approved local rabbi. Again, we will not resolve or even inquire into this dispute.

see how a court could separate "what is believed from what is believable." 322 U.S. at 92, 64 S.Ct. at ___, 88 L.Ed. at 1157. Yet, determining the bonafide nature of a person's belief is not foreign to the courts. It is found in the various conscientious objector adjudications. *See United States v. Seeger*, 380 U.S. 163, 165-66, 85 S.Ct. 850, 13 L.Ed.2d 733, 737 (1965); *Witmer v. United States*, 348 U.S. 375, 382-383, 75 S.Ct. 392, 99 L.Ed.2d 428, 434-435 (1955). Also, such a decision requires no subjective appraisal by the court. It is merely a determination of the existence of a state of mind, not its evaluation. As noted in the oft-cited quotation from Bowen, L.J. in *Edgington v. Fitzmaurice, L.R.* 29 C.D. 459, 483 (55 L.J. Chg. 650 1885), the "state of a man's mind is as much a fact as the state of his digestion." We reiterate that given the New York experience, we envision few if any cases where this issue will ever be adjudicated.

Plaintiffs argue that the State entangles itself in religion when it looks to an undefined body of Kosher law which is not spelled out in the regulations. This argument can be answered in two ways. First, plaintiffs have shown no dispute as to the interpretation of religious law. Second, the body of law is sufficiently definite that the reference is merely a shorthand for a known entity.

This issue has not presented a problem in the past. For example, in *Jones v. Butz, supra*, 374 F.Supp. 1284 (S.D.N.Y. 1974), aff'd 419 U.S. 806 (1974), the incorporation by reference of the Kosher slaughtering regulations as an exemption to the Humane Slaughter Act did not require a specification of the religious regulations for slaughter. Furthermore, in *Hygrade Provision Co. v. Sherman, supra*, 266 U.S. 497, 45 S.Ct. 141, 69 L.Ed. 402 (1925), decided prior to the First Amendment being made

applicable to the states, the word "Kosher" and the phrase "Orthodox Hebrew religious requirements" were found not to be unconstitutionally vague. In a libel setting, a contention that poultry was non-Kosher as held not to be impermissibly vague; the complaint, as phrased, stated a cause of action. *Cabinet v. Shapiro*, 17 N.J. Super. 540, 547 (Law Div. 1952). [20] In short, we have found no authority for plaintiffs' claim that a reference to the religious Kosher laws is impermissibly vague so that the State must adjudicate a religious issue to determine the standard to which a party will be held.

Ordinarily, scienter is not an essential element of a claim brought pursuant to regulations promulgated under the Consumer Fraud Act. *Fenwick v. Kay American Jeep, Inc.*, 72 N.J. 372, 378 (1977). Therefore both a knowing and a negligent violation of the regulations would be actionable. The penalty, however, might reflect this element as such. In the case before us we do not add a scienter element. Rather, the standard is defined by the good faith belief of the seller, who is then held to that standard and may be subject to administrative regulation for the intentional or negligent deviation from such standard. We expect that little or not

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[20] Out-of-state authorities have upheld various Kosher laws in the face of constitutional challenges. *See People v. Atlas*, 183 App.Div. 595 (1st Dept. 1918), aff'd without opinion 230 N.Y. 629 (1921) (prior to the sustaining of the New York regulation in *Hygrade Provision Co. v. Sherman*, 266 U.S. 497 (1925); *Ehrlich v. Municipal Court, Beverly Hills Judicial District*, 55 Cal.2d 553, 11 Cal.Rptr. 758, 360 P.2d 334 (1961); *Sossin Systems, Inc. v. Miami Beach*, 262 So.2d 28 (Fla. Dist. Ct. App. 1972); and *cf. National Foods, Inc. v. Rubin*, 727 F.Supp. 104 (S.D.N.Y. 1989), expressly not determining whether prosecution in the face of an "honest religious disagreement" is constitutional, and dismissing the matter because the theological problems raised had no relation to the civil rights claims before the court.

such adjustments from the generally-accepted Kosher rules will be needed. *See Hygrade Provision Co. v. Sherman, supra.* While *Hygrade* was decided in 1924, its logic is unassailable.

> It thus appears that, whatever difficulty there may be in reaching a correct determination as to whether a given product is kosher, appellants are unduly apprehensive of the effect upon them and their business, of a wrong conclusion in that respect, since they are not required to act at their peril, but only to exercise their judgment in good faith, in order to avoid coming into conflict with the statutes. Indeed, putting the statutes aside, such judgment they would be bound to exercise upon ordinary principles of fair dealing. By engaging in the business of selling kosher products they in effect assert an honest purpose to distinguish to the best of their judgment between what is and what is not kosher. The statutes require no more. Furthermore, the evidence, while conflicting, warrants the conclusion that the term 'kosher' has a meaning well enough defined to enable one engaged in the trade to correctly apply it; at least, as a general thing. If exceptional cases may sometimes arise where opinions might differ, that is no more than is likely to occur, and does occur, in respect of many criminal statutes either upheld against attack or never assailed as indefinite. [266 U.S. at 501-502; 45 S.Ct. at ___; 69 L.Ed. at 407].

We have accepted several representations of the State, plaintiffs or *amici*. The State persuasively argues that not only should the regulations be interpreted to permit good-faith divergence, but they are in fact so interpreted. We accept the State's representation that even if a major issue arises in New Jersey the State will look only at whether the interpretation is in accordance with the purveyor's sincerely-held belief. We also have viewed the regulations against the New York Attorney General's representations concerning the New York experience, particularly that the issues that plaintiffs claim draw the regulations into question have not surfaced in a 75-year history of enforcement. We further accept the position of those *amici* who assert that the word "Kosher," as it is presently understood by all branches of Judaism, is a term that has grown out of Orthodox Jewish principles, and that the interpretation of what is Kosher is an interpretation of these Orthodox principles. [21]

By upholding but liberally reading these regulations, we follow the precept that a regulation or statute should not be declared unconstitutional if it can be interpreted constitutionally. *New Jersey Bd. of Higher Ed. v. Shelton College*, 90 N.J. 470, 478-479 (1982); 2A *Sutherland, Statutory Construction* (4th ed. 1984) §45.11 at 46.

Plaintiffs have raised numerous additional constitutional arguments which we have considered and determined to have no merit.

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[21] If there is a bonafide challenge to this assumption made by this court, *i.e.*, if new Kosher standards are at some point promulgated by another branch of Judaism, the State of course could take no position as to the validity of one set of standards over the other. We accept the State's representation that it would not do so.

Since the State has acquiesced in the proposition that a good faith determination by plaintiffs concerning the Kosher nature of their products will not be subject to challenge, we see no injustice in plaintiffs being required to explain in the pending enforcement action what may be no more than suspicious circumstances. The State of course has the burden of proving the violation. But the standards, as contained in the disputed regulations, as we interpret them, are constitutional. This matter is remanded to the Chancery Division for such further proceedings as may be appropriate.

NOT FOR PUBLICATION WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-5420-88T2

RAN-DAV'S COUNTRY KOSHER, INC., a New Jersey Corporation t/a COUNTY KOSHER; ARTHUR WEISMAN and NADINE WEISMAN, individually and as Officers and Shareholders of RAN-DAV'S COUNTY KOSHER, INC.; and NEW JERSEY ALLIANCE OF KOSHER CATERERS,

Plaintiffs-Appellants,

v.

STATE OF NEW JERSEY; PETER N. PERRETTI, JR.; JAMES J. BARRY, JR.; RABBI YAKOV M. DOMBROFF; ATTORNEY GENERAL'S ADVISORY COUNCIL ON KOSHER FOOD; MORRIS GLATT, DIANE LaMONACO; and DOES 1-50,

Defendants-Respondents.

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D'ANNUNZIO, J.A.D. (Dissenting) AUG 06 1990

In my opinion the regulations at issue violate all three prongs of the test synthesized in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Despite the attempts of respondents and their supporting *amici* to place a commercial spin on the

preparation of kosher foods and, thereby, to justify State regulation of this "commerce," the laws of *kashrut* are laws of religious observance and ritual. As such, the State is prohibited by the Establishment Clause of the First Amendment to the United States Constitution from involvement in the definition and enforcement of the parameters of those religious practices even if we assume that currently there is a consensus within the Jewish community regarding them. *See Abington School District v. Schempp*, 374 U.S. 203 (1963) (the Establishment Clause prohibits more than government preference of one religion over another, it also prohibits aid to any religion).

Respondents contend that the regulations' purpose is the prevention of fraud and, therefore, it meets *Lemon*'s secular purpose prong. I reject this contention. It is too facile. Almost every attempt by the State to police religious practice can be justified as a legitimate attempt to prevent fraud. *Cf. Larson v. Valente*, 456 U.S. 228 (1982) (exemption from financial reporting and registration requirements limited to religious organizations receiving more than 50% of their contributions from members violates the Establishment Clause). Thus, a consumer protection regulation prohibiting a church from designating itself as Christian unless it professes and teaches the divinity of Jesus Christ would not satisfy the first prong despite the avowed objective of preventing fraud. In the hypothetical example, the regulation's purpose is the codification of an element of religious dogma acceptable to the State or to those persons in a position to influence the State. In the present case, the kosher regulations achieve the same end though in a more prosaic context.

These considerations also persuade me that the regulations' primary effect is the advancement of religion by

elevating the rules of *kashrut* to legal status, thereby violating *Lemon*'s second prong.

*Lemon*'s third prong is that the statute or regulation "must not foster an 'excessive government entanglement *with religion.*'" *Id.*, *403 U.S. at 613, quoting Walz v. Tax Commission*, 397 U.S. 664, 674 (1970). *Lemon*, defined the test of excessive entanglement in the following terms:

> In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority. Mr. Justice Harlan, in a separate opinion in Walz, *supra*, echoed the classic warning as to "programs, whose very nature is apt to entangle the state in details of administration. . . ." *Id.*, at 695. [403 U.S. at 615.]

The State's Bureau of Kosher Enforcement is engaged in a comprehensive scheme of governmental enforcement of the religious laws of *kashrut*. Not only does the State presume to adopt a regulation defining those laws, it has also enacted detailed regulations regarding the preparation, handling, maintenance, tagging and labeling of the product. Many of those detailed regulations are *kashrut* laws or derivatives. The State's chief enforcer is a rabbi and the State's advisory committee consists of ten rabbis. Thus, the State is heavily involved in the "details of administration." *Walz, supra*, 397 U.S. at 695 (Harlan, J., concurring). The regulatory scheme, therefore, involves the conferring of civil

authority on clergymen for the superintendence and enforcement of religious ritual.

Of equal concern is the "divisive political potential" of the kosher enforcement program. *Lemon, supra*, 403 U.S. at 622. All regulations are subject to fine tuning and change through the exercise of political influence or power. This regulatory scheme is pregnant with the danger of political activism to foster sincerely held religious beliefs or, in light of the commercial potential of the kosher food industry, to advance economic interests. Whether the motive is conscience or greed, the result will be government involvement in religious competition and dispute. This potential was recognized recently as one to be avoided in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982). In that case the Supreme Court invalidated a statute which gave church authorities the right to veto liquor license applications for any premises located within a radius of 500 feet of a church. The court stated:

> Section 16C substitutes the unilateral and absolute power of a church for the reasoned decision-making of a public legislative body acting on evidence and guided by standards, on issues with significant economic and political implications. The challenged statute thus enmeshes churches in the processes of government and creates the danger of "[p]olitical fragmentation and divisiveness on religious lines," *Lemon v. Kurtzman, supra*, at 623, 29 LEd 2d 745, 91 S Ct 2105. Ordinary human experience and a long line of cases teach that few entanglements could be more offensive to the spirit of the Constitution. [459 U.S. at 127; footnote omitted.]

*See Presbyterian Church v. Hull Church*, 393 U.S. 440 (1969) (civil courts constitutionally incapable of resolving ecclesiastical question to decide property disputes).

It may be contended that the regulatory scheme at issue is an innocuous and limited involvement of the State in the interests of consumer protection. That argument has particular appeal in light of the assumed absence of substantial differences at this time regarding the laws of *kashrut*. James Madison, in his Memorial and Remonstrance against Religious Assessments responded to that type of contention. He opposed a proposed Virginia tax assessment for the benefit of all religions in part

> Because, it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of [the] noblest characteristics of the late Revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principles. We revere this lesson too much, soon to forget it. Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to

> conform to any other establishment in all cases whatsoever? [1]

I find no state interest sufficiently compelling to justify the extent of government entanglement in religious ritual authorized in this regulatory scheme. I concede that consumer protection is a legitimate government interest. But as the majority points out the Jewish community effectively self-regulates purveyors' adherence to the laws of *kashrut*.

Finally, I reject *Hygrade Provision Co. v. Sherman*, 266 U.S. 497 (1925) as precedent in support of respondents' position. Although *Hygrade* involved the enforceability of a New York statute enacted to prevent fraud in the sale of food marketed as kosher, the challenge was not based on the First Amendment. When the Court decided *Hygrade* it had not yet recognized the Establishment Clause's applicability to the states through the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296 (1940). In *Hygrade* the statute was challenged on grounds of equal protection and due process and as contravening the Commerce Clause.

For the reasons stated above I would invalidate those parts of the regulatory scheme which involve the State in defining and enforcing religious ritual.

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[1] The complete text of Madison's Memorial is appended to Justice Rutledge's dissenting opinion in *Everson v. Board of Education*, 330 U.S. 1 (1946), beginning at p. 63.

# APPENDIX C

## 56.8-2. Fraud, etc., in connection with sale or advertisement of merchandise or real estate as unlawful practice

The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice; provided, however, that nothing herein contained shall apply to the owner or publisher of newspapers, magazines, publications or printed matter wherein such advertisement appears, or to the owner or operator of a radio or television station which disseminates such advertisement when the owner, publisher, or operator has no knowledge of the intent, design or purpose of the advertiser.

**56:8-2.10. Acts constituting misrepresentation of identity of food**

The identity of said food or food products shall be deemed misrepresented if:

a. Its description is false or misleading in any particular;

b. Its description omits information which by its omission renders the description false or misleading in any particular;

c. It is served, sold, or distributed under the name of another food or food product;

~~d.~~ It purports to be or is represented as a food or food product for which a definition of identity and standard of quality has been established by custom or usage unless it conforms to such definition and standard.

## SUBCHAPTER 21. REQUIREMENTS CONCERNING AND REQUIREMENTS FOR THE SALE OF KOSHER PRODUCTS

**13:45A-21.1 Definitions**

The following words and terms when used in this subchapter shall have the following meanings, unless the context indicates otherwise:

"Advertises, represents or holds itself out" means engaging in promotional activities including but not limited to newspaper, radio and television advertising and distribution of fliers.

"Kosher" means a Kosher food or food product which is prepared and maintained in strict compliance with the laws and customs of the Orthodox Jewish religion.

"Kosher brand" means a brand of a type approved by the United States Department of Agriculture.

"Kosher for Passover" means a Kosher food or food product which is prepared and maintained in strict compliance with the laws and customs of the Orthodox Jewish religion relating to the Jewish holiday of Passover.

"Kosher-style", "Kosher-type", "Jewish", "Hebrew" or other similar words mean a Non-Kosher food or food product which has not been prepared or maintained in strict compliance with the laws and customs which are generally recognized as being among the Orthodox Jewish religious requirements, but rather has either been prepared in such a way as to simulate the taste, appearance and/or consistency of a kosher food or food product or has originally been prepared in accordance with the above religious requirements but has not been maintained in the proper manner.

"Pareve" means a Kosher food or food product which is prepared and maintained in strict compliance with the laws

and customs of the Orthodox Jewish religion relating to non-dairy foods.

"Person" means an individual, corporation, business trust, estate, trust, partnership, association, two or more persons having a joint or common interest or, any other legal or commercial entity. When used in N.J.A.C. 13:45A-21.2, "person" shall include, in addition to all retail establishments, all dealers in Kosher food or food products, New Jersey-based manufacturers, wholesalers, processors, slaughterhouses and all others along the chain from the time the product is manufactured or, in the case of meat or poultry, from the slaughter to the time of its sale, and hold themselves out as Kosher or dealing with Kosher food or food products.

"Plumba" means the tin seal commonly used in the Kosher industry with the word "Kosher" indicated thereon either in English or Hebrew letters, and with certain letters, figures or emblems indicated thereon that will positively identify such plumba with the particular slaughterhouse where the animal was slaughtered or processed.

"Properly sealed packages" means those packages placed on the Kosher meat or Kosher food or food product by the manufacturer.

"Tag" means a tag of whatever form bearing the name and address of the slaughterhouse where the animal was slaughtered, the name of the person who sanctioned the Kosher slaughtering of meat at the slaughterhouse named and the date of the slaughter.

**13:45A-21.2 Unlawful practices**

(a) It shall be an unlawful consumer practice for any person to sell, offer for sale, expose for sale, serve or have in his possession with intent to sell, by any of the following means, in any restaurant, hotel, store or catering facility or

other place, any food or food product which is falsely represented to be Kosher, Kosher for Passover, under Rabbinical Supervision, pareve or as having been prepared under and/or with a product sanctioned by Orthodox Jewish religious requirements:

1. By direct statements, orally or in writing; or

2. By display of the word "Kosher" in English or Hebrew letters, or by display of any sign, emblem, insignia, six-pointed star, symbol or mark in simulation of the word Kosher; or

3. By inscription on any food or food product or its package, container or contents, the word "Kosher", "Pareve", "Glatt", or "Rabbinical Supervision" in English or Hebrew letters, or by display or inscription of any sign, emblem, insignia, six-pointed star, symbol or mark in simulation of the word Kosher. For the purposes of this paragraph, the marking of any food or food product or its package, container or contents with the English words "Kosher" or "Pareve", or with the letters "K", "KP", "KD", or "KOS", shall be deemed to be an unlawful practice if the product is not under rabbinical supervision; or

4. By display on any interior or exterior sign or menu or otherwise, the words "Kosher-Style", "Kosher-Type", "Jewish", "Hebrew", "Holiday (Jewish) Foods", "Traditional (Jewish)", "Bar Mitzvah", "Bat Mitzvah", or other similar words, either alone or in conjunction with the word "Type", "Style" or other similar expression, unless there is clearly and conspicuously stated a disclaimer in the same size type or letters in some prominent place or location that these terms refer to a Non-Kosher food or food product or food handling facility that does not observe Orthodox Jewish dietary laws; or

5. By advertisement, either oral or in writing, using the words "Kosher-Style", "Kosher-Type", "Jewish," "Hebrew", "Holiday (Jewish) Food", "Traditional (Jewish",

"Bar Mitzvah", "Bat Mitzvah", or other similar words, either alone or in conjunction with the word "Type", "Style" or other similar expression unless there is clearly and conspicuously stated a disclaimer in type no smaller than the smallest type in the advertisement, and in no event less than 10-point type, that the product or products offered for sale are not Kosher.

i. The disclaimer shall appear in a box within the advertisement and shall be preceded with the word "NOTICE", or other similar word, in not smaller than bold 14-point type.

ii. An advertisement that utilizes any Kosher symbol that also promotes the sale of non-kosher food or food products is in violation of this section unless there is clearly and conspicuously stated in the advertisement a disclaimer in accordance with the requirement of this paragraph, that some of the food or food products offered for sale are Non-Kosher; or

6. By unauthorized use of a Kosher food symbol including, but not limited to OU, OK, VH, NK, SK, CRC, KAJ, KOF-K.

**13:45A-21.3 Display and handling requirements**

(a) A Kosher food or food product sold by a restaurant, hotel, store, catering facility or other place which advertises, represents or holds itself out as selling, serving or offering for sale exclusively Kosher food or food products or both Kosher and Non-Kosher food or food products may be falsely represented to be Kosher within the meaning of N.J.A.C. 13:45A-21.2 unless the following display and handling requirements are observed:

1. Interior display and handling requirements are as follows:

i. Kosher meats, food or food products which are not prepared, cut, sliced, carved, broken down or divided into smaller portions on the premises of the place in which they are offered for sale, and which are contained in properly sealed packages, may be commingled with Non-Kosher meats, food or food products, provided, however, that if an establishment indicates by sign or label that kosher products are contained in a separate display cabinet or section, only Kosher products may be contained therein;

ii. Kosher meats, food or food products which are prepared, cut, sliced, carved, broken down or divided into smaller portions on the premises of the place in which they are offered for sale shall not be commingled with Non-Kosher meats, food or food products, Kosher meats, food or food products shall be kept in a separate display cabinet which shall not contained any Non-Kosher meat, Non-Kosher food or food products, or any dairy products and shall be separated from any Non-Kosher meats, Non-Kosher food or food products or any dairy products by a clearly visible divider.

iii. There shall be a clearly visible sign in block letters affixed to the separate display cabinet or Kosher section of said cabinet indicating that only KOSHER FOOD is contained therein and indicating which section contains only DAIRY products and which section contains only MEAT.

iv. Kosher dairy foods shall be prepared in utensils that are separate and distinct from those used to prepare Kosher or Non-Kosher meats and all servicing and eating utensils shall be kept separate and apart as either meat or dairy. Such Kosher meat and food or food products shall be sliced with a separate knife, and on a separate cutting board, or on a separate slicing machine, used solely for Kosher meat and food or food products and labelled "Kosher" in clearly visible block letters affixed to the knife

or, in the case of a slicer, either affixed to the slicer or displayed in a prominent place on the premises where the slicer is maintained.

v. No articles of food or food products, including meats, shall be sold as Kosher or Kosher for Passover unless a Kosher or Kosher for Passover identification is securely affixed thereto by the manufacturer or packer at his premises. No person other than such manufacturer or packer shall possess or affix such marks of identification.

vi. No raw meat or poultry may be sold or offered for sale as Kosher unless the words "soaked and salted", "not soaked and salted" or "soaked and salted upon request only", as the appropriate case may be, is prominently displayed on a sign in conjunction with the product. If the raw meat or poultry is packaged, the words "soaked and salted" or "not soaked and salted" may be marked on the package label in lieu of, or in addition to, the above requirement, but in no event shall packaged raw meat be sold or offered for sale as Kosher without the date of packaging clearly marked on the label. No person may sell or offer for sale, as Kosher, any raw meat or poultry that is identified as "soaked and salted" unless the product has been soaked and salted in a manner which makes it Kosher.

2. Washing and deveining requirements are as follows:

i. Kosher meats must be maintained Kosher and must be properly deveined and, with the exception of liver, washed within 72 hours after slaughter, and within each subsequent 72 hour period in accordance with the laws and customs of the Orthodox Jewish religion. The date and time of the day (A.M. or P.M.) of each washing and the name of the person performing such duty shall be legibly indicated on all tags attached to the said meat.

ii. Meats to be washed enroute shall be packed in such a manner as to allow washing to be done as prescribed above. The date and time of day of the washing shall be indicated on all tags or by means of a written statement securely attached inside the car or other vehicle and signed by the person supervising the washing. Upon receipt of the meat so washed enroute, the information contained in the written statement shall be legibly transferred to tags attached to the meat by the person receiving the meat.

iii. When tongues, offal and other parts of meat that are packed in containers and are not deveined, soaked, salted and rinsed in accordance with the Jewish laws of Koshering meat prior to shipping, they must be packed in containers that are sufficiently perforated to permit the free flow of water to reach all sides of said tongues, offal and other parts of meat packed therein and to enable the water to freely flow out again.

iv. When calves are shipped unflayed and part of the skin is detached from the meat, the water shall also reach every portion of the meat under the detached skin.

v. All marks of Kosher identification shall be removed by the owner or consignee from meat which has not been properly washed immediately after the time of washing has expired provided, however, that liver shall be excepted from the requirements of this paragraph. All marks of Kosher identification shall be removed by the owner or consignee from meat on which the date and time of day (A.M. or P.M.) of each washing have not been properly indicated on all tags attached thereto. Stamps, inscriptions and incision of Kosher marks of identification impressed on the meat shall be removed by the owner or consignee by blotting out and/or obliterating such marks of identification.

3. Exterior sign requirements are as follows:

i. Any restaurant, hotel, store, catering facility or other place as is described in (a) above shall

display a prominent place in its front window the following sign which shall be printed in block letters at least four inches in height:

"KOSHER AND NON-KOSHER FOOD PRODUCTS SOLD HERE."

**13:45A-21.4 Identification requirements**

(a) All meats sold as Kosher, regardless of the size of the portion, must have affixed thereto at the slaughterhouse a tag and/or plumba. The tags shall be affixed as follows:

1. For all forequarters of steers, cows, bulls, heifers, and yearling calves, the following Kosher identifications shall be affixed to each of the following parts:

i. Breast, rib, plate (outside), plate pieces (inside), chuck, shoulder, heart, lung, oxtail, tripe, milt (spleen), tenderloin (hanger): plumba and tag;

ii. Liver: two Kosher brands and two plumbas, one of each to opposite ends of liver, so that if the liver is cut in half through the vein each half will bear one plumba and one Kosher brand;

iii. Feet: plumba and tag to each foot;

iv. Breads: plumba and tag to each pair;

v. Brains: plumba to each brain, when sold separately from the head;

vi. Tongue: plumba and tag at the tip, and a Kosher brand at the tip on smooth surface;

vii. Breastbone: incisions in the form of Hebrew characters, showing date of slaughter.

2. For all foresaddles of veal, the following Kosher identification shall be affixed to each of the following parts:

i. Breast: incision on each in the form of Hebrew characters, showing date of slaughter;

ii. Rack: two incisions on the inside, one of them on each side of the spine, in the form of Hebrew characters, showing the date of slaughter;

iii. Shoulder: plumba and tag;

iv. Liver: plumba affixed to center of liver at the vein, and a Kosher brand on the upper surface of liver;

v. Haslett: plumba and tag through the heart and milt;

vi. Lung: plumba and tag;

vii. Feet: plumba and tag to each foot;

viii. Breads: one tag, and one plumba drawn through three pairs;

ix. Brains: plumba to each brain, when sold separately from the head;

x. Tongue: plumba and tag at the tip, and a Kosher brand at the tip of the smooth surface.

3. For all foresaddles of lamb and mutton, the following Kosher identifications shall be affixed of the following parts:

i. Breast: incision on each in the form of Hebrew characters, showing date of slaughter;

ii. Rack: two plumbas and two tags, one of each to either side of spine;

iii. Shoulder: plumba and tag;

iv. Haslett: plumba and tag through the liver and milt;

v. Tongue: one tag, and one plumba drawn through each group of six;

vi. Brains: plumba to each brain, when sold separately from the head;

vii. Liver: plumba and tag at center of liver, when sold separately from the haslett.

(b) All poultry sold as kosher must have plumbas affixed at the slaughterhouse, as follows:

1. Turkey necks: 10 pounds (lbs.) or less, in a bag securely closed with a plumba;

2. Chicken necks: Five lbs. or less, in a bag securely closed with a plumba;

3. Chicken and turkey livers: Two lbs. or less, in a bag securely closed with a plumba;

4. Chicken and turkey gizzards: Two lbs. or less, in a bag securely closed with a plumba.

5. Chicken wings: Five lbs. or less, in a bag securely closed with a plumba;

6. Turkey wings: 10 lbs. or less, in a bag securely closed with a plumba;

7. Chicken and turkey thighs with back portion: Each piece is to have securely affixed thereto a plumba;

8. Chicken and turkey legs: Each piece is to have securely affixed thereto a plumba;

9. Chicken and turkey boneless breasts: Five lbs. or less, in a bag securely closed with a plumba;

10. Chicken and turkey breasts: Each piece is to have securely affixed thereto a plumba;

11. Chicken and turkey boneless bottom meat: Five lbs. or less, in a bag securely closed with a plumba; and

12. Chicken and turkey whole poultry: Each piece is to have securely affixed thereto a plumba.

(c) The slaughterer and/or wholesaler of kosher poultry is responsible to ensure that plumbas are affixed and so remain, as stated in (b) above. Slaughterers and/or wholesalers may not refuse to accept returned poultry not identified in accordance with this section and must provide a refund for the returned item.

**13:45A-21.5 Filing requirements**

(a) Any restaurant, hotel, store, catering facility, or other place which advertises, represents or holds itself out as

selling, serving or offering for sale exclusively Kosher food or food products, shall either file with the Director of the Division of Consumer Affairs a document in writing from a supervising rabbi or rabbinical organization that said establishment meets Orthodox Jewish dietary laws or, if said establishment is not under rabbinical supervision, so advise the Director. The Director of the Division of Consumer Affairs shall be informed in writing, within 10 business days, of any change in the Kosher or rabbinical supervision status referred to above. Failure to advise the Director of the Division of Consumer Affairs of a change in the Kosher or rabbinical supervision status as provided herein, shall constitute an unlawful practice as defined by N.J.A.C. 13:45A-21.2.

(b) Any person or organization giving Kosher supervision to any restaurant, hotel, store, catering facility, slaughterer, or other place shall file with the Director of the Division of Consumer Affairs a document in writing listing the name, address and type of establishment that is certified. The Director of Division of Consumer Affairs shall be informed in writing, within 10 business days, if said supervision or supervising agency removes such supervision. Failure to advise the Director of Division of Consumer Affairs of said removal shall constitute an unlawful practice as defined by N.J.A.C. 13:45A-21.2.

**13:45A-21.6 Presumptions**

Possession of any Non-Kosher food or food product in any restaurant, hotel, store, catering facility or other place where food or food products are sold and/or served which advertises, represents or holds itself out as only selling Kosher food or food products, is presumptive evidence that the person is in possession of such food or food products with the intent to sell the same.

**13:45A-21.7 Exculpatory section**

A restaurant, hotel, store, catering facility or other place where food or food products are sold and/or served shall not be deemed to have committed an unlawful practice under N.J.A.C. 13:45-21.2 if it can be shown by a preponderance of the evidence that it relied in good faith upon the representations of a slaughterhouse, manufacturer, processor, packer or distributor of any food or food product represented to be Kosher, Kosher for Passover or as having been prepared under or sanctioned by Orthodox Jewish religious requirements.

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SUBCHAPTER 22. INSPECTIONS OF KOSHER MEAT DEALERS, KOSHER POULTRY DEALERS, AND DEALERS OF KOSHER FOOD AND FOOD PRODUCTS; RECORDS REQUIRED TO BE MAINTAINED BY KOSHER MEAT DEALERS AND KOSHER POULTRY DEALERS

**13:45A-22.1 Definitions**

The following words and terms when used in this subchapter shall have the following meanings, unless the context indicates otherwise:

"Dealers in Kosher food or food products" means any store, restaurant, hotel, catering facility or other place where foods or food products are sold or offered for sale or served as Kosher or as having been prepared under and/or with a product sanctioned by Orthodox Jewish religious requirements.

"Kosher meat dealer" means any person engaged in the slaughtering or wholesaling of property identified Kosher meat or who purchases, obtains or receives properly

identified Kosher meat from slaughterhouses, wholesalers or other sources and who cuts, slices, carves, breaks down or divides such kosher meat into smaller quantities or portions intended for sale to a customer as Kosher meat. Places of business carrying on the aforesaid actions include, but are not limited to: caterers, hotels, summer camps, butcher shops, delicatessens, supermarkets, grocery stores, freezer dealers and food plan companies. Such places of business may also purchase, sell, handle, package and process Non-Kosher meat and other Kosher and Non-Kosher food products.

"Kosher poultry dealer" means any person engaged in the slaughtering or wholesaling of properly identified Kosher poultry who purchases, obtains or receives properly identified kosher poultry from slaughterhouses, wholesalers or other sources and who cuts, slices, carves, breaks down or divides such kosher poultry into smaller quantities or portions intended for sale to a customer as Kosher poultry. Places of business carrying on the aforesaid actions include, but are not limited to: caterers, hotels, summer camps, butcher shops, delicatessens, supermarkets, grocery stores, freezer dealers and food plan companies. Such places of business may also purchase, sell, handle, package and process Non-Kosher poultry and other Kosher and Non-Kosher food products.

"Non-Kosher meat" means meat which is not obtained from animals which are approved, and slaughtered, in strict compliance with the laws and customs of the Orthodox Jewish religion and which does not have affixed thereto the Kosher plumba or Kosher tag placed on such Kosher meat at the slaughterhouse where the animal was slaughtered. Non-Kosher meat also means meat which is obtained from animals which are approved and slaughtered in strict compliance with the laws and customs of the Orthodox Jewish religion but which does not have affixed thereto the Kosher plumba or Kosher tag placed on such meat at the slaughterhouse where the animal was slaughtered.

"Non-Kosher poultry" means poultry which is not approved, and slaughtered, in strict compliance with the laws and customs of the Orthodox Jewish religion and which does not have affixed thereto the Kosher plumba or Kosher tag placed on such poultry at the slaughterhouse where the poultry was slaughtered. Non-Kosher poultry also means poultry which is approved and slaughtered in strict compliance with the laws and customs of the Orthodox Jewish religion but which does not have affixed thereto the Kosher plumba or Kosher tag placed on such poultry at the slaughterhouse where the poultry was slaughtered.

"Properly identified Kosher meat" means Kosher meat which is obtained from animals which are approved and slaughtered in strict compliance with the laws and customs of the Orthodox Jewish religion and which has affixed thereto the Kosher plumba placed on such Kosher meat at the slaughterhouse where the animal was slaughtered.

**13:45A-22.2 Records required to be maintained by Kosher meat dealers and Kosher poultry dealers**

(a) Complete and accurate records of all purchases of properly identified Kosher meat and properly identified Kosher poultry from slaughterhouses, wholesalers or any other source shall be kept by every Kosher meat dealer and by every Kosher poultry dealer, including the name and address of the slaughterhouse, wholesaler or other source from which such purchases are made, the dates, quantities and identity or nature of meat or poultry included in all such purchases, and copies of all invoices and bills of sale relating to all such purchases. Kosher meat dealers and Kosher poultry dealers shall retain all such records for a two year period following the purchase or properly identified Kosher meat and properly identified Kosher poultry.

(b) Kosher meat dealers and Kosher poultry dealers shall not remove the attached plumbas or tags or any duly affixed identifications affixed thereto by the slaughterhouse or Kosher meats, Kosher poultry, or any other Kosher products received therefrom until the time immediately preceding the point in time when said Kosher meat, Kosher poultry, or product whenever appropriate is ready to be cut, sliced, carved, broken down, or divided into smaller quantities or portions.

(c) Complete and accurate records of all purchases of Non-Kosher meat and Non-Kosher poultry from slaughterhouses, wholesalers or other sources shall be kept by any Kosher meat dealer and by any Kosher poultry dealer, who also purchases, sells, handles, packages or processes Non-Kosher meat, poultry or food products, including the name and address of the slaughterhouse wholesaler or other source from which such purchases are made, the dates, quantities and identity or nature of meat or poultry included in all such purchases, and copies of all invoices and bills of sale relating to all such purchases. Such records shall be kept separate and apart from all records required to be kept for Kosher meat and for Kosher poultry. Kosher meat dealers and Kosher poultry dealers shall retain all such records for a two year period following the purchase of Non-Kosher meat and Non-Kosher poultry.

(d) A failure to keep complete and accurate records in accordance with (a) and (c) above shall be punishable as an unlawful act under this subchapter.

**13:45A-22.3 Inspections of Kosher meat dealers, Kosher poultry dealers and dealers in Kosher food or food products.**

(a) The inspection provided for by this section shall only be conducted by authorized inspectors of the Director of

the Division of Consumer Affairs of the Department of Law and Public Safety.

(b) In conducting an inspection as provided for by this subsection, the authorized inspectors shall utilize the inspection report form, approved by the Director of the Division of Consumer Affairs of the Department of Law and Public Safety, to report the date of the inspection, the nature and scope of the inspection and the findings of the inspection.

(c) For the purpose of making any inspection under this section, the authorized inspectors of the Director of the Division of Consumer Affairs in the Department of Law and Public Safety shall have a right of entry to, upon and through the business premises of all Kosher meat dealers, Kosher poultry dealers, and dealers in Kosher food or food products.

(d) Authorized inspectors of the Director of the Division of Consumer Affairs in the Department of Law and Public Safety shall make inspections of Kosher meat dealers, Kosher poultry dealers and dealers in Kosher food or food products for the purpose of:

1. Determining by examination of the meat, poultry, food products, tags, plumbas, or any other proper identification and by inspection of the records, whether the establishment under inspection is in compliance with these rules.

(c) The scope and manner of inspection shall be as follows:

1. At the commencement of all inspections provided for by this section, the authorized inspectors of the Director of the Division of Consumer Affairs of the Department of Law and Public Safety shall present appropriate identification to the Kosher meat dealer, kosher poultry dealer and/or Kosher food or food products dealer, owner, manager or any sales person and shall advise the kosher meat dealer, kosher poultry dealer and/or Kosher food or food products dealers,

owner, manager or any sales person of the purposes of the inspection to be conducted under the provisions of this section.

2. All inspections provided for by this section shall be limited to:

i. The meat and poultry and other food products located on the business premises of the Kosher meat dealer, Kosher poultry dealer and/or Kosher food or food products dealer. The business premises shall include all places of storage of meats, of poultry and/or of food or food products, all places where meat, poultry and/or food or food products are cut, sliced, carved, broken down, or divided into small quantities or portions and all places where meat, poultry and/or food or food products are sold to customers; and

ii. The records required to be kept by Kosher meat dealers and Kosher poultry dealers under the provisions of this subchapter.

3. The inspections provided for by this section shall be made during the regular business hours of the Kosher meat, Kosher poultry and/or Kosher food or food products dealer, and at any time including non-business hours when deliveries of meat, poultry and/or food or food products are made to the dealer or when the dealer is engaged in the cutting, slicing, carving, breaking down, preparing, packaging, processing, or dividing of meat, poultry and/or food or food products into smaller quantities or portions.

4. In carrying out the requirements of this section, no advance notice of an inspection shall be provided to any person.

5. All inspections of the meat, poultry and/or food or food products located on the business premises of Kosher meat dealers, Kosher poultry dealers and/or Kosher food or food products dealers and all inspections of the records required to be kept by them under the provisions of this

subchapter shall be conducted in such a manner as to not unduly interfere with the regular business operations of the Kosher meat dealers, Kosher poultry dealers and/or Kosher food or food products dealers.

(f) A failure to allow an authorized inspector a right of entry upon the business premises of a Kosher meat dealer, Kosher poultry dealer and/or Kosher food or food products dealer in accordance with the requirements of this section shall be punishable as an unlawful act under this subchapter.

(g) At the completion of all inspections provided for by this section, the authorized inspectors of the Director of the Division of Consumer Affairs of the Department of Law and Public Safety shall make an inspection report, which shall show the date of the inspection, the nature and scope of the inspection and the findings of the inspection. A copy of the inspection report shall be filed with the records of the Director of the Division of Consumer Affairs.

(h) Inspectors authorized by the Director of the Division of Consumer Affairs in the Department of Law and Public Safety may, under the following circumstances, tag meat, poultry and/or food or food products as evidence of a possible violation of this subchapter.

1. Upon reasonable suspicion that certain meat, poultry and/or food or food products in the possession of a Kosher meat dealer, Kosher poultry dealer and/or Kosher food or food products dealer is not Kosher;

2. Upon discovery that certain meat and/or poultry in the possession of the Kosher meat dealer and/or Kosher poultry dealer is not identified in accordance with N.J.A.C. 13:45A-21.4;

3. Upon discovery that certain meat and/or poultry in the possession of the Kosher meat dealer and/or Kosher poultry dealer has not been maintained in accordance with N.J.A.C. 13:45A-21.3(a)2.

(i) A Kosher meat dealer, Kosher poultry dealer and/or Kosher food or food products dealer whose meat is tagged as evidence in accordance with (h) above may not remove the tag or dispose of the meat, poultry and/or food or food product for a period of 72 hours unless notified otherwise by an authorized representative of the Director of the Division of Consumer Affairs of the Department of Law and Public Safety. If an administrative complaint is issued within the above 72 hour period by the Division of Consumer Affairs, the tagged meat, poultry and/or food or food product may be impounded by an authorized inspector. Removal of the aforesaid tag or disposal of tagged meat, poultry and/or food or food product in violation of this paragraph shall constitute an unlawful practice as defined in this section.

(2)

No. 92-1053

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1992

NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA"),

*Petitioner,*

v.

RAN-DAV'S COUNTY KOSHER, INC., a New Jersey Corporation t/a COUNTY KOSHER; ARTHUR WEISMAN and NADINE WEISMAN, individually and as officers and shareholders of RAN-DAV'S COUNTY KOSHER, INC.; and NEW JERSEY ALLIANCE OF KOSHER CATERERS,

*Respondents,*

and

STATE OF NEW JERSEY; PETER N. PERRETTI, JR; JAMES J. BARRY, JR.; RABBI YAKOV M. DOMBROFF; ATTORNEY GENERAL'S ADVISORY COUNCIL ON KOSHER FOOD; MORRIS GLATT; DIANE LAMONACO; AND DOES 1-50,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey**

## BRIEF ON BEHALF OF RESPONDENTS, STATE OF NEW JERSEY, ET AL, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the Establishment Clause prohibits New Jersey's Division of Consumer Affairs from enforcing the New Jersey Consumer Fraud Act and its implementing regulations against merchants who through material omissions or misrepresentations mislead consumers as to the preparation or content of food advertised as kosher?

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STATE OF NEW JERSEY; PETER N. PERRETTI, JR; JAMES J. BARRY, JR.; RABBI YAKOV M. DOMBROFF; ATTORNEY GENERAL'S ADVISORY COUNCIL ON KOSHER FOOD; MORRIS GLATT; DIANE LAMONACO; AND DOES 1-50,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey**

## BRIEF ON BEHALF OF RESPONDENTS, STATE OF NEW JERSEY, ET AL, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The State of New Jersey and its designated officials support the petition of the National Jewish Commission

on Law and Public Affairs requesting that a writ of certiorari issue to review that portion of the above-entitled judgment and opinion of the Supreme Court of New Jersey of July 22, 1992 which invalidated certain portions of the consumer fraud regulations governing the kosher-foods industry in New Jersey.

## STATEMENT OF THE CASE

This facial challenge to kosher food regulations of the New Jersey Division of Consumer Affairs, promulgated under the authority of the State Consumer Fraud Act, was initiated following the commencement of an enforcement proceeding by the Attorney General of New Jersey alleging violations of the regulations and Act by two of the respondents before this Court, Ran-Dav's County Kosher, Inc., t/a County Kosher, a kosher butcher, and Arthur Weisman, its owner. While denominated as a facial challenge, the appellate record in this matter includes filings in the ultimately stayed enforcement proceeding as well as a multitude of secondary source material, largely irrelevant to the difficult constitutional issues posed.

The Division of Consumer Affairs in promulgating regulations governing the preparation and sale of kosher food adopted the Orthodox Jewish standard because that standard reflects the practices of the national kosher food industry, has been adopted by various courts and legislatures, and is recognized by all denominations of Jews in New Jersey as the commonly understood meaning of kosher. (Pet. App. A at 38a, 49a-52a; Pet. App. B at 72a,

75a). While the record contains information that acknowledges nominal differences between Orthodox and Conservative views of Jewish dietary laws, and indeed among Orthodox Jewish authorities themselves, (Pet. App. A at 6a, 20a-21a), "neither the record nor the secondary sources . . . establish that those disputes are so pervasive and substantial as to engender a dispute over religious doctrine in the routine enforcement actions contemplated by the regulations." (Pet. App. A at 48a; See also Pet. App. B at 72a, 82a-83a). As well, there is nothing in the record to indicate that New Jersey or the State of New York in its seventy-five year history of kosher enforcement has pursued any enforcement action where a religious dispute existed as to the requirements of kosher laws. (Pet. App. B at 79a). Indeed the unrefuted policy of the State is that where good faith differences exist as to a product, rather than impose religious restrictions, the State will accept those variations (Pet. App. B at 70a) but require conspicuous disclosure of the varying view in a commercial transaction (Respondent's brief in Supreme Court of New Jersey at 37-39).[1]

Central to the Consumer Fraud Act, *N.J.S.A.* 56:8-1 *et seq.*, and attendant regulations, *N.J.A.C.* 13:45A-21.1 *et seq.* (Pet. App. C at 95a-113a), is the disclosure of accurate information. The regulations require that food offered for sale as kosher comply with various display, identification,

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[1] The standard, as noted above, is sufficiently definite and objective to permit the State to seek limited injunctive relief requiring disclosure without resorting to religious determinations. The majority opinion holds that disclosure of the basis on which the characterization of kosher rests is "key" to a constitutional regulatory approach. (Pet. App. A at 29a).

and verification requirements (Pet. App. C at 98a-104a), in order that persons who choose to hold themselves out as purveyors of kosher food meet consumer expectations. The State's consumer protection policy is not concerned with the religious purity of kosher products, but merely requires consistency between the representation of the content and preparation of the product and the product itself in a commercial transaction.[2]

Where misrepresentations or omissions do occur, the Consumer Fraud Act reposes enforcement authority with the Attorney General of the State. *N.J.S.A.* 56:8-3, 56:8-8. Neither the regulatory scheme reviewed here nor the record demonstrates any deviation from that practice. The regulations do not confer on religious persons or bodies any authority to interpret or enforce the law. The regulations make no reference to any religious body, nor is religious training a requirement for the position of Bureau Chief or for the positions of inspectors.[3] Finally, adjudication of all the complaints initiated under the regulations rests with the courts or the Director of the Division of Consumer Affairs.

As discussed more fully in the petition, the Superior Court of New Jersey, Appellate Division in a 2-1 vote upheld the validity of the regulations against a variety of federal and state constitutional challenges (Brief of Pet. at 7-8; Pet. App. B at 85). By reason of the dissenting judge's

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[2] For example, the regulations do not require that there be rabbinical supervision of establishments selling kosher food.

[3] The record reveals that a former bureau chief was not a rabbi or an observant Jew, and one of the inspectors was not Jewish. (Pet. App. A at 46a).

opinion on the Establishment Clause challenge, this issue alone came before the Supreme Court of New Jersey as a matter of right. *N.J. Ct. R.* 2:2-1. By a vote of 4-3 the Supreme Court of New Jersey reversed, invalidating as violative of the Establishment Clauses of the federal and state constitutions those portions of the regulations, which in its view "impose substantive religious standards for the actual preparation and maintenance of kosher food." (Pet. App. A at 30a).[4]

The Supreme Court remanded to the Division of Consumer Affairs for the expeditious reformulation of the regulations consistent with its opinion. Pursuant to that directive Division staff is completing the draft regulations and anticipates publishing the proposed regulations shortly.

## REASONS FOR GRANTING THE WRIT

As the majority opinion of the Supreme Court of New Jersey recognizes and the split of opinion at both state appellate levels confirms, the Establishment Clause challenge posed by the facial attack upon New Jersey's kosher food regulations presents a "difficult and unusual issue." (Pet. App. A at 4a). While the majority of the Supreme Court of New Jersey finds confirmation of its views in the opinions of this Court, most notably in

[4] The State respondents concur in the analysis set forth in the petition at pages 11-12 that the majority's ruling does not rest on an adequate and independent state ground under the analysis set forth in *Michigan v. Long*, 463 *U.S.* 1032, 1037-44 (1983).

*Larkin v. Grendel's Den, Inc.*, 459 *U.S.* 116 (1982) (Pet. App. A at 14a-19a, 26a) and *School District of Grand Rapids v. Ball*, 473 *U.S.* 373 (1985) (Pet. App. A at 25a-26a), the dissenting opinion of that Court points to the conceptual difficulties in extending these decisions to the New Jersey kosher fraud enforcement scheme. Thus, whereas the majority finds that the State's reference to largely undisputed standards for kosher food preparation "inextricably intertwine[s] . . . the secular law of the State" with religious law (Pet. App. A at 15a), thereby fostering excessive governmental entanglement with religion, the dissenting state justices' review of the record lead them to conclude that the regulations' reference to the Orthodox Jewish standard simply recognizes a well-developed and widely accepted industry practice. As such, they conclude "the regulations do not require the State to make religious determinations[,]" but to enforce regulations "referring only to objective and therefore, secular criteria." (Pet. App. A at 34a). The dissenting justices find support for this conclusion in the opinion of this Court in *Hygrade Provision Co. v. Sherman*, 266 *U.S.* 497 (1925). There, in rejecting a vagueness challenge to New York's criminal kosher food fraud statute, this Court held that the term kosher "has a meaning well enough defined to enable one engaged in the trade to correctly apply it; at least as a general thing." 266 *U.S.* at 502.

Similarly, the majority concludes that the creation of an Advisory Committee of rabbis to "advise the Attorney General on Kosher matters and enforcement of the New Jersey Kosher regulations . . . and make recommendations for regulatory changes" and the appointment of an

ordained Orthodox Jewish rabbi as the Chief of the Bureau responsible for the investigation of fraud in the kosher food industry creates an entanglement between religion and state "even more apparent" than in *Larkin v. Grendel's Den, supra.* (Pet. App. A. at 19a). The dissenting opinion distinguishes *Grendel's Den,* finding that there final governmental decisionmaking authority was effectively ceded to private, sectarian bodies. In this matter, in the dissenting justices' view, neither the regulations nor the Executive Directive creating the Advisory Committee delegate to the Committee the power to direct or veto a decision of the Bureau. (Pet. App. A. at 47a). The dissent similarly notes the absence of any requirement in the regulations or any record evidence of an administrative policy requiring that either the Bureau Chief or kosher fraud inspectors be rabbis or even Jewish. (Pet. App. A at 46a).

The conflicting interpretations of this Court's establishment of religion precedent is revealed as well in the majority and dissenting justices' analysis of the "effects" prong of the *Lemon v. Kurtzman,* 403 *U.S.* 602, 612-613 (1971) test. In the view of the majority, the State, by adopting a standard emanating from religious doctrine and permitting religiously trained individuals to participate in the administration of its enforcement scheme, necessarily advances the religious tenets of Orthodox Jewish law and "foster[s] a close identification of its powers and responsibilities with those of a[] . . . religious denomination." (Pet. App. A. at 25a, quoting from *School District of Grand Rapids v. Ball, supra,* 473 *U.S.* at 389). Contrastingly, the dissenting justices point to the commands of *Grand Rapids* and *Allegheny County v. ACLU,* 492

*U.S.* 573, 595-598 (1989) that reviewing courts look to the context of the religious reference in determining whether "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." (Pet. App. A at 44a, quoting from *Allegheny County v. ACLU, supra,* 492 *U.S.* at 597, in turn quoting from *School District of Grand Rapids v. Ball, supra,* 473 *U.S.* at 390). Applying that standard, the dissenting opinion finds the public unlikely to perceive the State's consumer fraud efforts as

> endorsing Orthodox Judaism or as disapproving other religious choices. Enforcement does not encourage consumers to purchase kosher food, nor does it encourage merchants to sell kosher food. Further, because the regulations on their face authorize factual inquiries in order objectively to apply non-disputed kosher principles, the State is not forcing compliance with a particular religious interpretation; rather, it enforces unitary standards that do not favor a particular religion or religious sect. [Pet. App. A. at 45a].

The dissenting opinion also highlights the thorny issue of whether the majority correctly invalidated the regulations in the context of a facial challenge on the record presented to the court. As the dissent notes in citing to several of this Court's rulings in establishment of religion challenges, "[i]t has not been the Court's practice, in considering facial challenges to statutes . . . to strike them down in anticipation that particular applications may [produce unconstitutional results]." *Roemer v. Board of Public Works,* 425 *U.S.* 736, 761 (1976), cited with approval in *Bowen v. Kendrick,* 487 *U.S.* 589, 601 (1988).

(Pet. App. A at 39a). Thus, in Establishment Clause challenges the Court has required that the challenger demonstrate that the constitution is necessarily violated every time the law is enforced. *Committee for Public Education & Religious Liberty v. Nyquist*, 413 *U.S.* 756, 779-80 (1973). In this matter, the dissenting opinion notes that the only applications of the regulations brought to the court's attention – the underlying state enforcement action – failed to establish a likely dispute as to religious doctrine. (see Pet. App. A at 53a to 54a; Pet. App. B at 68a). See also Pet. App. A at 48a to 49a.[5]

While the Supreme Court of New Jersey has allowed for some form of continued regulation of fraud in the kosher food industry (Pet. App. A at 29a to 30a), it is likely that Establishment Clause challenges will continue to be mounted based upon the majority's broad reading of the "effects" prong of the *Lemon v. Kurtzman* test. In this regard the Court's disposition of the pending *Zobrest v. Catalina Foothills School District*, No. 92-94 docket, will provide further clarification as to the "primary effect advancing religion test" of *Lemon* and correspondingly, the "symbolic union of government and religion" analysis of *School District of Grand Rapids v. Ball, supra*, 473 *U.S.* at 389, relied upon by both the Supreme Court of New Jersey and the Ninth Circuit Court of Appeals in *Zobrest v. Catalina Foothills School District*, 963 F.2d. 1190, 1194 (9th Cir.) pet. for cert. gr. 61 *U.S.L.W.* 3256 (October 5, 1992).

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[5] New York's 75-year enforcement history reveals a similar absence of religious dispute. (Pet. App. B at 85a).

As the petitioner has urged, even if the Court were not presently inclined to grant a writ of certiorari to review the ruling below, it would be appropriate to retain this case on the docket to await the disposition of *Zobrest*. That result will afford the State of New Jersey and other jurisdictions which vigorously enforce their consumer fraud laws on behalf of consumers of kosher food the necessary guidance to insure continued conformity with First Amendment requirements.

## CONCLUSION

For the above stated reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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# Supreme Court of the United States

October Term, 1992

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*Petitioner,*

*v.*

RAN-DAV'S COUNTY KOSHER, INC., ARTHUR AND NADINE WEISMAN, AND NEW JERSEY ALLIANCE OF KOSHER CATERERS,

*Respondents,*

AND

STATE OF NEW JERSEY, ET AL.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

## BRIEF IN OPPOSITION OF RESPONDENTS RAN-DAV'S COUNTY KOSHER, ARTHUR AND NADINE WEISMAN, NEW JERSEY ALLIANCE OF KOSHER CATERERS

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## QUESTIONS PRESENTED

1. Does this Court have jurisdiction (and does the Petitioner have standing) under Article III to review a decision of a state court striking down state regulations as unconstitutional, where the State itself has declined to seek review and where the sole Petitioner is a private organization of lawyers and social scientists seeking to revive the state regulations in order to further its own abstract social interests?

2. Under the doctrine of *Michigan v. Long*, 463 U.S. 1032 (1983), does this Court have jurisdiction to review a state court decision invalidating state regulations under both the Federal and state Constitutions, where the court expressly invoked state constitutional provisions and decisions and noted that the "state constitutional standard is informed by an understanding of federal constitutional doctrine"?

3. Does a state impermissibly entangle government in sectarian religious disputes when it (a) expressly incorporates into state consumer law the dictates of Orthodox Jewish kosher dietary rules; (b) mandates, on pain of prosecution, that all kosher food establishments adhere to the state's understanding of "strict compliance with the laws and customs of the Orthodox Jewish religion;" (c) appoints a government panel of rabbis to share responsibility for enforcing those laws; and (d) requires its courts to resolve disputes between competing rabbinical interpretations of these religious dietary doctrines?

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## STATEMENT OF THE CASE

At issue in this case is an attempt by a religious organization of lawyers and social advocates to resurrect a controversy over state regulations that were invalidated under both the State and Federal Constitutions. The State itself has abandoned the invalidated regulations, is about to publish substitute regulations, and has not petitioned this Court for review of the state court decision below.

### A. The Orthodox Jewish Dietary Laws of Kosher.

The word "kosher" comes from the Hebrew *kasher* and means "ritually correct." (5a).[1] It refers to the Jewish dietary laws that guide the practice of *kashrut* — a practice one follows to attain *kedusha* or "holiness." (5a). These religious dietary laws have been developed through several thousand years of Talmudic debates and rulings by rabbinical scholars as to what animals one may eat, how the animals must be slaughtered, and how the meat products must be prepared and served. The kosher laws are meant to make food ritually correct, not more healthful. "The classical Jewish commentators agree that the laws concerning kosher and non-kosher food do not have any rational basis *that a human being can understand*. Their purpose, so we are told, is to show the Jew's obedience to God as God, even where the human intellect cannot comprehend why He decreed any specific law." S. Himelstein, THE JEWISH PRIMER: QUESTIONS AND ANSWERS ON JEWISH FAITH AND CULTURE 185 (1990)(emphasis in original).

As the New Jersey Supreme Court recognized, "[t]he laws of *kashrut* are complex and exacting." (5a). "Central to the doctrine of *kashrut* is the requirement of the *mashgiach*, the religious authority who must supervise kosher butchers and certify compliance with the laws of *kashrut*." (5a). Relying in part on authorities provided by Petitioner COLPA itself, the New Jersey Supreme Court found that

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[1] References to the appendix bound with the Petition, which contains the decision below, will be styled "__a." References to the appendices submitted by respondents to the New Jersey Supreme Court will be styled "N.J.S.Ct. App., Vol. __ at __." References to the appendices as they appeared before the Appellate Division of the Superior Court will be styled "App.Div.App. at ___." References to the Petition for Certiorari will be styled "Pet. at ___. References to the Brief of Respondent New Jersey will be styled "N.J. Br. at __."

"there is considerable disagreement over what precepts or tenets truly represent the laws of *kashrut*. There are differences of opinion concerning the application and interpretation of the laws of *kashrut* [even] within Orthodox Judaism." (6a). *See also* 20a-21a.[2] Moreover, the court below also found that "[d]isputes constantly arise within Orthodox Judaism over the legitimacy of the various religious authorities purporting to ensure that food is kosher." (6a).[3]

## B. The New Jersey Kosher Enforcement Regime.

The challenged regulations prohibit the sale of food "falsely represented to be kosher," N.J. ADMIN. CODE § 13:45A-21.2(a), (96a-97a), and define "kosher" food as that "prepared and maintained in *strict compliance with the laws and customs of the Orthodox Jewish religion*." § 13:45A-21.1 (95a)(emphasis added). As the New Jersey Supreme Court recognized, "the regulations refer explicitly to the 'Orthodox Jewish religion' and the 'laws and customs' of that religion to specify the standards that apply to the kosher food industry." (8a). To determine precisely what kosher dietary laws require, and to aid it in deciding how and against whom the regulations should be enforced, the New Jersey Attorney General relies on his Advisory Council on Kosher Food, which "consists of ten rabbis appointed by the Attorney General." (9a). The Chairman of this committee, currently Rabbi Yakov Dombroff, "is the Chief of the Bureau of Kosher Enforcement" within the Division of Consumer Affairs. (9a). The court below definitively held that, under New Jersey law, this state-appointed rabbinical council "shares responsibility for the enforcement of the regulations." (9a). The penalties for violating the Attorney General's and

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[2] *See* Brief of COLPA as *Amicus Curiae* in the Superior Court of New Jersey, Appellate Division, at 5 n.3 & attached addenda. The court below expressly endorsed reliance on these and the other secondary sources entered into the record by the parties in order to ascertain the scope and nature of the doctrinal dispute over kosher dietary laws. (20a-21a).

[3] For example, KASHRUS MAGAZINE, Sept., 1990, 26-32, published a guide to "over 100 rabbinically supervised kosher supervision services world-wide, but withh[eld] endorsement of any particular service with the following disclaimer: '*Some of the [supervision services] are not relied upon by most of the kosher world. Consult your rabbi for which symbols you should use.*'" (6a)(emphasis in original).

his rabbinical council's understanding of kosher dietary doctrine include injunctions against further operation of a kosher business, N.J.S.A. § 56:8-8, civil fines, § 56:8-13, and conviction of a disorderly persons offense, § 2C:21-7.4. (8a).

**C. This Litigation.**

This case arose out of a dispute among ordained Orthodox Jewish authorities about kosher practices at Respondent Ran-Dav's County Kosher, an establishment run by Respondents Arthur and Nadine Weisman. Mr. Weisman is a practicing Jew who operates his store "in accord with Jewish requirements as [he] understand[s] them and as [his] supervising Rabbi directs." App.Div.App. at Aa46. Ran-Dav's is under the supervision of an ordained Orthodox rabbi, Harry Cohen, who makes unscheduled on-site inspections two or three times a week. *Id.* at Aa41. Rabbi Cohen, a retired Army chaplain with the rank of lieutenant colonel, is a former member of the Rabbinical Council of America and has served as the supervising rabbi for kosher establishments in New York since 1954. *Id.* Rabbi Cohen is of the opinion that Ran-Dav's "conscientiously observe[s] rabbinical instruction concerning the preparation and handling of kosher products." *Id.* at Aa41; *see also* 9a.

For the last decade, Rabbi Cohen, who resides in and conducts his kosher supervision duties from New York, has had a doctrinal dispute with New Jersey rabbinical authorities over the propriety of kosher supervision of a New Jersey establishment by a rabbi from outside the local Orthodox community — a dispute that was related to a falling-out a decade ago between New Jersey rabbis and New Jersey kosher establishments. N.J.S.Ct.App., Vol. II, at Da245-47. The Rabbinical Council of America (RCA) "questioned the ethics" of an "out of state" rabbi giving kosher supervision "in areas where [New Jersey] RCA men reside." *Id.* at Da248. Rabbi Cohen was formally charged with having profaned God's name by having given his endorsement to a New Jersey butcher shop which had, in another rabbinical authority's opinion, committed a breach of kosher dietary laws. *Id.* at Da250. Rabbi Cohen was expelled from the RCA on the basis of this dispute, *id.* at Da251, and notices were published in New Jersey synagogue newsletters advising exercise of "proper judgment for ads listing [Rabbi Cohen] as the certified

rabbi" for a kosher food establishment. *Id.* at Da252-53. When Rabbi Cohen unsuccessfully sought to litigate his expulsion from the RCA in the New York courts, the RCA itself averred that such "ecclesiastical" disputes were no business of the civil courts. *Id.* at Da254-56.

All three of the kosher establishments targeted for enforcement by Rabbi Dombroff and the Kosher Enforcement Bureau were under the rabbinical supervision of Rabbi Cohen. *Id.* at Da257; App.Div. App. at Aa41. The consumer fraud proceedings against Ran-Dav's and the other establishments began with a press release issued on the eve of Passover. The effect on their businesses was devastating; Ran-Dav's ultimately filed for bankruptcy in January of 1993.

After reviewing the specific kosher violations alleged in the State's complaint, Rabbi Cohen concluded in a sworn affidavit that the supposed transgressions "range from baseless to highly debatable." App.Div.App. at Aa42.

As a defense and counterclaim to the state's consumer fraud enforcement action, Ran-Dav's and the New Jersey Alliance of Kosher Caterers, which joined as a party, argued that the kosher regulations violated the Religion Clauses of the New Jersey and Federal Constitutions. The trial court directed that constitutional challenge to the Appellate Division for resolution. (4a). Therefore, as New Jersey itself points out, N.J. Br. at 2, although this case was denominated below as a facial challenge, it arose out of and was considered with the entire record generated by the actual enforcement action against Ran-Dav's County Kosher. *See also* 20a.

**D. The Decision of the New Jersey Supreme Court.**

The New Jersey Supreme Court sustained Ran-Dav's and the Kosher Caterers' constitutional challenge and struck the kosher regulations down under both the New Jersey and the Federal Constitutions. (3a, 10a). After a careful examination "of the record and secondary sources," the court below found that differences of opinion and disputes exist "with respect to the laws of *kashrut*," "[b]ecause of varying doctrinal interpretations, varying degrees of trust that members of some sects place in the food supervisors of

other sects, and varying 'shades of observance' undertaken by individual Jews." (20a). These disputes "are ineluctably religious in tenor and content." (20a).[4]

Despite endorsement of their kosher practices by their own ordained, Orthodox rabbis, "merchants sincerely believing that their products are kosher could nevertheless be prosecuted under the regulations if the State believes that their products do not conform to the standards of Orthodox Judaism *as the State defines and applies them*." (13a)(emphasis added). The New Jersey Supreme Court noted that although the State had waffled on this issue in the lower appellate court (12a-13a; 21a-22a), the State ultimately "abandoned its position that the regulations allow different interpretations of the kosher laws." (13a). New Jersey's highest court deemed it decisive that the "Attorney General's current understanding of the kosher regulations [as inflexible] comports with the actual text of the regulations, which refers to the kosher laws as those being in 'strict compliance' with Orthodox Jewish doctrine." (21a).[5]

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[4] Respondent New Jersey contends that the record does not establish more than "nominal" doctrinal differences over kosher dietary requirements, and that the Orthodox kosher regulations may therefore be enforced without fear of any "'dispute over religious doctrine.'" N.J. Br. at 3. In making these assertions, New Jersey thus takes issue with the express *factual* findings of the New Jersey Supreme Court. The State offers an interpretation of the record that was flatly rejected below, and the State accordingly cites only to the *dissent* below and to the Appellate Division opinion, which has been *reversed*.

[5] The State continues to bend its purported understanding of the kosher regulations to fit its ever-changing litigation strategy. As respondent here, the State represents that the "unrefuted policy of the State is that where good faith differences exist as to a product, rather than impose religious restrictions, the State will accept those variations," N.J. Br. at 3.

*First*, this is a flat misrepresentation of the record and of the State's position below. As explained above in text, New Jersey expressly abandoned this position of administrative flexibility. (12a-13a; 21a-22a). The State now attempts to mislead this Court by citing only to the now-vacated opinion of the intermediate appellate court, wholly ignoring the opinion of New Jersey's highest court. N.J. Br. at 3.

*Second*, the State's disingenuous disclaimer that it will not enforce against kosher establishments espousing good faith religious differences of opinion is belied by the State's enforcement action in this very case. New Jersey pressed its consumer fraud prosecution even after Rabbi Cohen, Ran-Dav's ordained,

As the court below found, the regulations "'do not police the nutritional quality or sanitary purity of kosher food, but only its religious purity.'" (15a).

> [The regulatory regime] does more than require that businesses purporting to be under a certain type of rabbinical supervision are in fact under that type of supervision; it requires such establishments to adhere strictly to religious kosher standards in the conduct of their business and authorizes the State to monitor adherence to those standards. As a result, Jewish law prescribing religious ritual and practice is inextricably intertwined with the secular law of the State. Further, the State itself takes on the traditional religious supervisory role, thereby partially supplanting the Jewish organizations and institutions that historically have stood as final judges of religious matters.

(15a). Therefore, "[t]he conclusion is inescapable that if a merchant did not adhere to Jewish Orthodoxy, as perceived by the Bureau of Enforcement, and the State legally challenged the merchant's right to sell his or her products as 'kosher,' a court would have to resolve whether the merchant's view of *kashrut* diverged from the State's definition of Jewish Orthodoxy. It is difficult to envision a civil controversy stamped more indelibly with religious doctrine." (22a).

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Orthodox, supervising rabbi, stated that the supposed kosher violations identified by Rabbi Dombroff and the rabbis of the Kosher Enforcement Bureau were either baseless or highly debatable. This religious, doctrinal dispute between Orthodox Jewish authorities — which the State candidly described early in the litigation as a difference of "opinion," App.Div.App. at Aa138 — did not deter the State from prosecuting Ran-Dav's and running it out of business.

*Third*, and most importantly, New Jersey's highest court has now authoritatively interpreted the regulations as requiring non-discretionary "'strict compliance' with Orthodox Jewish doctrine" (21a), and neither the State nor Petitioner can challenge that binding determination in this Court.

*Finally*, we note that the State's demonstrated inability to stick with a position on this issue from one brief or oral argument to the next may help explain why the State dithered about for five months and then ultimately chose *not* to seek review of the decision below.

In any event, the decision below rejected, as wholly missing the point, the argument that alleged unanimity on what kosher law requires would eliminate government advancement of, and entanglement with, religion. As the court below observed, the "laws of *kashrut* are intrinsically religious, whether they are ambiguous or not and whether they are disputed or not. Religious doctrines cannot be recast as secular principles simply because they are clear." (22a) (citing *Lee v. Weisman*, 112 S.Ct. 2649 (1992)).

The New Jersey Supreme Court invalidated the regulations under both the New Jersey and Federal Constitutions because "[t]he regulations authorize a consumer fraud action founded on the fact that the product itself was prepared or maintained in ritually incorrect fashion, in violation of the laws of *kashrut*. In that respect, the regulations are . . . 'quintessentially and unavoidably religious in character.' *The regulations have been designed to assure truth in marketing, but the truths being marketed are, in essence, religious truths.*" (28a)(emphasis added).

The court below recognized that "false promotion of non-kosher foods harms a variety of consumers," including observant Jews who might be induced unwittingly to break the laws of their faith, adherents of other faiths who buy kosher in order to observe their own tenets forbidding consumption of pork, and those who may deem kosher meat superior because it is prepared under especially close scrutiny. (7a). The court further recognized that the state may regulate the advertising and labeling of kosher food in order to address these problems, and may forbid fraud in representation of religious supervision. "The key to such a regulatory approach would be . . . to require those who advertise food products as 'kosher' to disclose the basis on which the use of that characterization rests. Many kosher food purveyors would comply by imprinting the symbol of one of the recognized private agencies that supervise kosher compliance (*e.g.*, "U" for the Union of Orthodox Jewish Congregations of America). Other kosher establishments could comply with a disclosure requirement by indicating other forms of rabbinical supervision." (29a).

Under this regime, consumers could identify and buy from those kosher establishments certified by the particular religious authorities

whom those consumers follow, and eschew patronage of establishments supervised by rabbis or organizations which those consumers and their religious guides deem suspect or unorthodox. Just as the state may bar the promotion of products as having been endorsed by a particular consumer magazine or tested by a particular laboratory when they have not in fact been so endorsed or tested, so the state may bar the promotion of products as having been prepared under the supervision of a particular rabbi or rabbinical organization when they have not in fact been so prepared. (30a).

The New Jersey Supreme Court remanded to the trial court to dismiss the consumer fraud complaint against Ran-Dav's, and also, pursuant to an established state procedure, remanded directly to the Division of Consumer Affairs for the formulation of new kosher regulations consistent with its opinion. (30a).

The State obtained a 60-day extension of time within which to file a petition in this Court, but after five months of consideration it decided not to seek a writ of certiorari. The State's consumer fraud complaint against Ran-Dav's has been duly dismissed with prejudice. State compliance with the remand to the Division of Consumer Affairs has also already transpired. The State of New Jersey informs us in its brief that the Attorney General's staff "is completing the draft regulations and anticipates publishing the proposed regulations shortly." N.J. Br. at 5. A bill introduced in the New Jersey Legislature, Senate No. 1318, would essentially enact the kosher regime recommended by the New Jersey Supreme Court.

Certiorari has been sought in this Court *only* by the National Jewish Commission on Law and Public Affairs (COLPA), which appeared as an *amicus curiae* and ultimately as a party-intervenor in the New Jersey courts. COLPA's petition names New Jersey and the other State parties as respondents. New Jersey has filed no cross-petition, has made no appearance as a petitioner, and has not invoked the jurisdiction of this Court.

## REASONS FOR DENYING THE WRIT

### I. PETITIONER HAS NO STANDING UNDER ARTICLE III TO SEEK REVIEW OF THE DECISION BELOW.

This case is controlled by *Diamond v. Charles*, 476 U.S. 54 (1986). There, the State of Illinois, like the State of New Jersey here, chose not to seek review of a decision invalidating a state law on constitutional grounds. *Id.* at 56. Review was sought in that case, as it has been here, only by a private party that had intervened in the lower court. *Id.* at 57. Illinois was named as an appellee, just as New Jersey has here been named as a respondent. *Id.* at 61. Illinois filed a document with this Court stating that although it had not appealed the decision against it, the State's "interest in this proceeding" was "essentially co-terminous with the position on the issue set forth by the [intervenor/]appellant." *Id.* Here New Jersey, after taking five months to weigh the decision to seek certiorari and ultimately deciding *not* to, has filed a brief as respondent, supporting the petition. This brief is indistinguishable from the document filed by Illinois in *Diamond*, for in each case the state made no attempt to invoke the jurisdiction of this Court as petitioner or appellant.

As this Court held in *Diamond*, "status as a 'party' does not equate with status as an appellant. . . . By not appealing the judgment below, the State indicated its acceptance of that decision, and its lack of interest in defending its own statute. The State's general interest may be adverse to the interests of the appellees, but its failure to invoke our jurisdiction leaves the Court without a 'case' or 'controversy' between appellees and the State of Illinois." *Id.* at 63-64. *United States v. Providence Journal Co.*, 485 U.S. 693 (1988), involved a court-appointed special federal prosecutor's unsuccessful attempt to invoke this Court's jurisdiction after the United States, through the Solicitor General, declined to seek a writ of certiorari. The fact that the United States had not itself sought certiorari mandated the conclusion that this Court lacked jurisdiction: "We dismiss the writ even though the United States eventually expressed its 'interest' in the litigation and the Solicitor General

filed a brief for the United States as *amicus curiae* in support of the petition taken by the special prosecutor." *Id.* at 699 n.5.[6] A show of solidarity with or support for a former litigation ally, whatever form it may take, is not, in jurisdictional terms, a substitute for actually seeking review by filing a petition for a writ of certiorari.

The fact that Petitioner COLPA was granted "party-intervenor" status under state law by the New Jersey Supreme Court has no bearing on whether COLPA has standing to challenge the decision below in this Court. States are of course free to manage their own judicial procedures without respect to Article III of the Federal Constitution, and New Jersey's "rules of standing are more liberal than the federal rules." *Right to Choose v. Byrne*, 91 N.J. 287, 313 (1982) ("any slight additional interest is sufficient to afford standing to private individuals to raise issues of great public interest"). But "an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III." *Diamond v. Charles*, 476 U.S. at 68. COLPA's "ability to 'piggyback' on the State's undoubted standing exists only if the State is in fact an appellant before the Court; in the absence of the State in that capacity, there is no case for [the intervenor] to join." *Id.* at 64.

The "core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992).

> First, the [party] must have suffered an "injury in fact" — an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of

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[6] *See also Karcher v. May*, 484 U.S. 72, 83 (1987) ("The controversy ended when the losing party — the New Jersey Legislature — declined to pursue its appeal."); *Bender v. Williamsport Area School District*, 475 U.S. 534 (1986) (individual dissenting member of school board lacked standing to appeal after school board voted not to appeal); *see id.* at 549 (Marshall, J., concurring) (controversy ended when School Board lost below and failed to appeal).

> — the injury has to be "fairly . . . trace[able] to the challenged action of the [other party], and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

*Id.* COLPA, as the party invoking this Court's jurisdiction, "bears the burden of establishing these elements." *Id.* Proof is required, because these "are not mere pleading requirements." *Id.*

COLPA must show that it has "'personally suffered some actual or threatened injury as a result of the putatively illegal conduct' of the other party." *Diamond v. Charles*, 476 U.S. at 62. "The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements." *Id.* Although COLPA fails to identify in its petition just what sort of organization it is, when it appeared in the New Jersey courts below it described itself as "an organization of volunteer *lawyers and social scientists* that advocates the position of the Orthodox Jewish Community on legal issues." Brief of COLPA as *Amicus Curiae* in the Superior Court of New Jersey, Appellate Division, at 1 (emphasis added). While their zeal may be commendable, the status of COLPA's members is at best that of bystanders.

It therefore comes as no surprise that COLPA has not even alleged, let alone adduced facts to prove, any actual or imminent injury to itself or its members. *See Lujan*, 112 S.Ct. at 2138; *Diamond*, 476 U.S. at 65. It is a "'first principle of federal jurisdiction,' appl[icable] 'whether the case is at the trial stage or the appellate stage,'" that the "necessary factual predicate" for standing *must be in the record and "may not be gleaned from the briefs and arguments themselves."* *Bender v. Williamsport*, 475 U.S. at 547 (emphasis added). COLPA has never shown that its members reside in New Jersey and observe kosher dietary laws as promulgated by the state, let alone that they have a grievance against Ran-Dav's or any other kosher establishment. On the record in this case, COLPA's members, as "lawyers and social scientists," can at most complain that the decision below is "simply a setback to the organization's abstract social interests." *Havens Realty Corp.*

*v. Coleman*, 455 U.S. 363, 379 (1982).[7] The only interest COLPA can present is "simply the expression of a desire" that the now-invalidated and soon-to-be replaced New Jersey kosher regulations be resurrected and enforced. *Diamond*, 476 U.S. at 66. But "Article III requires more than a desire to vindicate value interests. It requires an 'injury in fact' that distinguishes 'a person with a direct stake in the outcome of a litigation — even though small — from a person with a mere interest in the problem.'" *Id.* at 66-67. Such an "'abstract concern . . . does not substitute for the concrete injury required by Art. III.'" *Id.* at 67. *See id.* at 75 (O'Connor, J., joined by Burger, C.J., and Rehnquist, J., concurring) ("abstract interests" and an interest that is "nothing more than a desire" are insufficient).

This Court has "consistently held that a [party] raising only a generally available grievance about government — claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large — does not state an Article III case or controversy." *Lujan*, 112 S.Ct. at 2143. There is nothing in the New Jersey kosher regulations to suggest that the state meant "to confer legally protectible interests on particular beneficiaries of that law." *Diamond*, 476 U.S. at 76 (O'Connor, J., concurring). New Jersey enacted a "law which it would itself enforce, thereby making violators liable to the public as a whole, not to those members of the public who might in some degree benefit from the law's enactment or enforcement." *Id.*

In this respect COLPA's standing is also fatally flawed as to the Article III requirement of redressibility. *See Bender*, 475 U.S. at 542. Even if the New Jersey regime were revived by this Court, neither COLPA nor anyone else "could compel the State to enforce it against [respondents] because 'a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.'" *Diamond*, 476 U.S. at 64 (quoting *Linda R. S. v. Richard D.*,

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[7] An association's claim of standing requires "the same inquiry as in the case of an individual," *Harris v. McRae*, 455 U.S. 363, 378 (1980), and the organization's standing, if any, derives from that of its members. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

410 U.S. 614, 619 (1973)). Here, as in *Diamond*, the "concerns for state autonomy that deny private individuals the right to compel a State to enforce its laws apply with even greater force to an attempt by a private individual to compel a State to create and retain the legal framework within which individual enforcement decisions are made." 476 U.S. at 65. COLPA's "attempt to maintain the litigation is, then, simply an effort to compel the State to enact a code in accord with [COLPA's] interests." *Id.*

None of this is changed by the decision of New Jersey, as respondent here, to file a brief supporting COLPA's petition. For the *jurisdictionally dispositive fact* remains that the State did not itself invoke the jurisdiction of this Court. *Providence Journal*, 485 U.S. at 699 n.5; *Diamond v. Charles*, 476 U.S. at 63-64. As the Court observed in *Diamond*, a "State's reasons for abandoning" a suit, even when the state files a document supporting an intervenor's appeal, may sometimes involve intervening legislative or administrative amendment of the challenged rules. *Id.* at 63 n.16. As the State itself notes, the State's Division of Consumer Affairs, in accord with the New Jersey Supreme Court's specific remand to that agency, has already engaged in "expeditious reformulation of the regulations consistent with [the] opinion" and "anticipates publishing the proposed regulations shortly." N.J. Br. at 5. Since the State did not seek certiorari, did not seek any stay of the decision below, and has already begun implementing the new regime pursuant to the remand, it appears that the kosher regulatory regime that COLPA would have this Court resurrect no longer exists. Despite its belated and quixotic appearance as a respondent here, New Jersey has already moved on and COLPA's petition has been effectively mooted.

The "decision to seek review must be placed 'in the hands of those who have a direct stake in the outcome.'" *Diamond*, 476 U.S. at 62. Here those hands belong to New Jersey, which received an extra 60 days in which to ponder its course. Five months of consideration led it to the decision not to seek review in this case. As for COLPA, the decision to seek review "is not to be placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" *Id.* at 62. The Petitioner has no standing under Article III to seek review of the

decision below, and therefore this Court has no jurisdiction because no case or controversy exists.

## II. THE DECISION BELOW RESTS ON AN ADEQUATE AND INDEPENDENT STATE LAW GROUND.

Even if the Petitioner had standing, this case would remain an unsound vehicle for considering any federal Establishment Clause issue because the reliance by the court below on the New Jersey Constitution would render advisory any opinion issued by this Court. Article I, ¶ 4 of the New Jersey Constitution provides that "[t]here shall be no establishment of one religious sect in preference to another." (10a). The New Jersey Supreme Court repeatedly invoked this provision, in addition to the federal Establishment Clause, in striking down the regulations (3a, 4a, 10a, 11a, 19a, 29a), and expressly held that "the kosher regulations violate the Establishment Clauses of the federal *and state* constitutions." (4a)(emphasis added). "[I]f a state court decides that a particular state action violates *both* federal and state law, the final state court judgment is not reviewable by the Supreme Court." Justice O'Connor, *Our Judicial Federalism*, 35 CASE WES. L. REV. 1, 5-6 (1984) (original emphasis). *See, e.g., Henry v. Mississippi*, 379 U.S. 443 (1965).

To be sure, the New Jersey Supreme Court found federal decisions, like those from other jurisdictions, instructive. (*See, e.g.*, 23a) (citing New York and federal decisions). But this does not diminish either the independence or the adequacy of the state law ground for the decision below. "If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached." *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). That plain statement was provided when the court below expressly noted that its "interpretation of the state constitutional standard *is informed* by an understanding of federal constitutional doctrine concerning the establishment of religion." (11a)(emphasis

added). *See Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 556 (1940) (if the "state court employed the decisions under the federal constitution merely as persuasive authorities for its independent interpretation of the state constitution . . . we would have no jurisdiction to review").

Article I, ¶ 4 of the New Jersey Constitution does not merely mimic the federal Establishment Clause. Petitioner makes much of the fact, noted by the court below, that, because it "contains no reference to the 'free exercise' of religion," New Jersey's Religion Clause is in one respect "'less pervasive, literally, than the Federal provision,' and [the New Jersey Supreme Court] has not been impelled to interpret the state constitution more broadly than the federal constitution . . . ." (11a)(*quoted in* Pet. at 11). But this passing comment has no bearing on this particular case, as the New Jersey precedents cited by the court below — but ignored by Petitioner — make plain. (11a).

The New Jersey Establishment Clause is "less pervasive, literally," than its federal counterpart because the former bars any "establishment of one religious sect *in preference* to another," N.J.Const., Art. I, ¶ 4 (emphasis added), while the latter dictates that "Congress shall make no law *respecting* an establishment of religion." U.S. Const., Amend. I (emphasis added). The New Jersey Supreme Court identified this difference in emphasis in *Marsa v. Wernik*, 86 N.J. 232, *cert. denied*, 454 U.S. 958 (1981), *cited below* at 11a, and explained that the court has, "therefore, generally limited [its] discussion to the federal provision as interpreted by the United States Supreme Court *in situations where under the particular facts no one religious sect was assertedly preferred over other sects*." 86 N.J. at 239 n. 2 (emphasis added). *See also Resnik v. E. Brunswick Tp. Bd. of Educ.*, 77 N.J. 88, 104 (1978) (Art. I, ¶ 4, applies only when "one religious sect was preferred over other sects")(*cited below* at 11a).

If, however, a particular sect or denomination has allegedly been given preferential treatment, then the challenged New Jersey government action must establish "compelling criteria to meet the exacting judicial scrutiny required under the New Jersey Constitution to ensure that no religious sect dominates and that no sect is

disfavored." *Marsa v. Wernik*, 86 N.J. at 240 n.2. The New Jersey Supreme Court explained that "[s]uch scrutiny may very well be different from" and "more exacting" than that accorded under the Federal Constitution, *id.*, and went on to delineate additional analytical and doctrinal distinctions between the state and federal Establishment Clauses when a religious preference is at issue. *Id. See also Tudor v. Bd. of Educ.*, 14 N.J. 31, 41-44 (1953)(Vanderbilt, C.J.)(N.J. Const. by its very terms, not merely by interpretation, prohibits *any* religious preference)(*cited below* at 10a-11a).[8]

The New Jersey Supreme Court's basis for finding a religious preference forbidden by state law in this case was further bound up with other state law doctrines that are beyond the bailiwick of this Court. For example, the court below held that, under state law, the State's action in appointing an Orthodox rabbi to head the State Bureau of Kosher enforcement, and its decision to staff the Attorney General's Kosher Advisory Council with Orthodox rabbis, were administrative acts relevant to the court's interpretation of the kosher regulatory regime, and supportive of the court's ruling on the preferential "sectarian nature of the regulations." (17a-18a) (citing *Cedar Cove, Inc. v. Stanzione*, 122 N.J. 202, 212 (1991), and *Peper v. Princeton University*, 77 N.J. 55, 69-71 (1976)).

Although the opinion below made reference to the test formulated by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), *see* 13a-14a, it did so because New Jersey law "is informed by" an understanding of federal law (11a), and because that decision provides a useful analytical framework for applying New Jersey's (and other jurisdictions') precedents assessing church-state enactments, *not* because *Lemon* or any other federal precedent governs

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[8] This case is thus easily distinguished from those instances where this Court has found jurisdiction to review a state court judgment because the state court opinion stated that the state right was identical to the federal right, *see Pennsylvania v. Muniz*, 496 U.S. 582, 588 n.4 (1990); *ASARCO v. Kadish*, 490 U.S. 605, 624-25 (1989); *Maryland v. Garrison*, 480 U.S. 79, 83-84 (1987), or because the state precedents relied upon by the state court did not interpret the state law provision differently from the cognate federal guarantee, *see Montana v. Hall*, 481 U.S. 400 (1987)(per curiam); *New York v. P.J. Video*, 475 U.S. 868, 872 n.4 (1986); *Delaware v. Van Ardsall*, 475 U.S. 673, 677 (1986); *California v. Carney*, 471 U.S. 386, 389 n.1 (1985); *Ohio v. Johnson*, 467 U.S. 493, 497 n.7 (1984).

the interpretation of New Jersey's distinct ban on sectarian preferences. Thus, in *Right to Choose v. Byrne*, 91 N.J. 287 (1982), *cited below* at 11a, the New Jersey Supreme Court considered a challenge to a state law based on the *New Jersey* Establishment Clause, even though the court recognized that the plaintiff's parallel challenge under the *Federal* Establishment Clause was foreclosed by a prior decision of this Court. *Id.* at 312-13, 316 (discussing *Harris v. McRae*, 448 U.S. 297 (1980)). Denial of federal constitutional relief did not resolve the state law issue, even though analysis of the claim under Art. I, ¶ 4 of the New Jersey Constitution proceeded under the analytical framework of the test set forth in *Lemon* and other decisions of this Court. *See* 91 N.J. at 313. The simple reason for this is that the New Jersey Establishment Clause is a distinct constitutional guarantee that does not merely parrot the federal guarantee and that is not governed by federal precedent.

Similarly, in this case the New Jersey Supreme Court, while employing the framework of the three-part test familiar to this Court, relied heavily on New Jersey as well as federal precedents in interpreting Art I, ¶ 4 as invalidating the kosher regulations. Indeed, the court below relied exclusively on New Jersey precedents when it held that the New Jersey courts may not decide "disputes involv[ing] interpretations of religious doctrine itself." (23a) (citing *Elmora Hebrew Center v. Fishman*, 125 N.J. 404, 420 (1991) ("only a religious authority may be able to decide the scope of duties of an 'orthodox Rabbi'"); *Chavis v. Rowe*, 93 N.J. 108, 111-12 (1983) ("plaintiffs would have us perform a task better left to exegetes. . . . Such hermeneutics are beyond this Court's realm."); *Alicea v. New Brunswick Theological Seminary*, 244 N.J.Super. 119 (App.Div. 1990) (the judicial inquiry into church customs and practices sought by the plaintiff "would constitute an 'establishment of religion with a vengeance'"), *aff'd on other grounds*, 128 N.J. 303 (1992). "New Jersey cases have long held that civil courts lack jurisdiction over spiritual matters and the administration of church affairs that do not affect the civil or property rights of individuals." *Chavis*, 93 N.J. at 109 (citing a line of authority that began in 1894, half a century before the federal Establishment Clause was held applicable to the states). In particular, the New Jersey courts have long disclaimed "the right, authority or jurisdiction to declare or to

find what is kosher and what is non-kosher . . . ." *Cabinet v. Shapiro*, 17 N.J.Super. 540, 547 (Law Div. 1952).[9]

Accordingly, the decision below rests upon an adequate and independent state law ground and is therefore wholly inappropriate for review by this Court. *Michigan v. Long*, 463 U.S. at 1040-42. Finally, Respondents note that the need to maintain uniformity in federal law, which usually augers in favor of certiorari when a state court has deviated from established federal doctrine, *see id.* at 1040, is in any event not implicated on the face of the Petition. As the following sections explain, Petitioner does not even assert, much less show, that the state court decision below misapplied existing federal doctrine, *see* Pet. at 12-14; instead, Petitioner openly seeks a change in federal law under the Establishment Clause. *See* Pet. at 14. Even if the enormous jurisdictional barriers could be overcome, this case would remain a singularly unworthy vehicle for venturing forth on the trip that Petitioner wishes to take.

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[9] This established corpus of state authority distinguishes this case from those instances in which this Court took jurisdiction, despite an asserted independent state law ground, because although the state court had relied on state precedents, those precedents were cited only for holdings on *federal* law. *See Illinois v. Rodriguez*, 497 U.S. 177, 182 (1990); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 11-12 n.5 (1990); *Michigan v. Chesternut*, 486 U.S. 567, 570 (1988); *Oliver v. United States*, 466 U.S. 170, 175 n.5 (1984).

## III. THE PETITION FAILS TO IDENTIFY ANY ISSUE OF FEDERAL LAW ON WHICH THE DECISION BELOW IS IN ERROR OR IN CONFLICT WITH ANY DECISION OF ANY FEDERAL COURT, AND THE ASSERTED "CONFLICT AMONG STATE COURTS" IS NOT ONLY A SHAM BUT IS IN ANY EVENT BEYOND THE JURISDICTION OF THIS COURT.

Petitioner offers no argument that the decision below misapplied this Court's Establishment Clause jurisprudence. The disagreement with the decision of the New Jersey Supreme Court seems to be based not on its application of the governing law, but rather on its resolution of the facts surrounding enforcement of the kosher consumer law in this case.[10] Petitioner's only criticism of the New Jersey Supreme Court's analysis is the implicit contention that the Establishment Clause is entirely inapplicable to this case because no one "is forced" to prepare and sell kosher food: if a vendor chooses to represent that his wares were prepared in accord with the ancient dietary doctrine of *kashrut*, the New Jersey regulations demand only that the vendor's application of those religious dietary laws follow the religious teachings favored by the state's advisory panel of rabbis. Pet. at 10.

Petitioner has missed the point. The fact that devotion to any given religious code or faith is voluntary does not empower the state to enact its own particular understanding of that code into civil law and to enforce compliance with it, under pain of prosecution, by those whose souls hearken to the call of that faith. Arthur Weisman, a practicing Jew and the proprietor of Ran-Dav's County Kosher, prepares his kosher ("ritually correct") food — consumed by Orthodox Jews in the dietary practice of *kashrut* in order to attain

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[10] Should the Court choose to consider the Brief *Amici Curiae* of Rabbinical Associations, it will discover that the would-be *amici* likewise openly predicate their argument for certiorari on an alleged need to correct supposed "factual errors" made by the New Jersey Supreme Court. *See id.* at 4, 5.

*kedusha* ("holiness") — in accord with the millennia-old rules of *kashrut* as he understands them and as his ordained Orthodox rabbi directs. The state may require that Mr. Weisman and all other kosher vendors disclose to the consuming public the basis for the representation that their food is kosher and the identity and religious affiliation of their supervising rabbis, if any. In this way, consumers may judge for themselves, perhaps in consultation with their own rabbis, whether that food meets the consumers' own religious dietary standards. But the state may *not*, as COLPA contends, force Mr. Weisman or any other Orthodox Jew to observe the particular version of the rules of *kashrut* that the state has chosen to enact into law, and which the state interprets and enforces with the aid of state-appointed rabbinical authorities.

Instead of urging certiorari to review an alleged misapplication of federal constitutional law, or to resolve some supposed conflict between the decision below and some federal precedent, COLPA asks this Court to resolve what it represents as a "Conflict Among State Courts." Pet. 12. Petitioner seems to be unaware that this Court is a tribunal of limited jurisdiction concerned exclusively with *federal* law.

The first authority adduced is *Barghout v. Mayor & City Council*, 325 Md. 311, 600 A.2d 841 (1992), in which Maryland's highest court upheld a municipal ordinance against a challenge based on a provision of the Maryland Constitution. The *Barghout* court expressly noted that it was not considering any issue of federal constitutional law, 600 A.2d at 849, and that the Maryland Constitution did not contain any provision similar to the Federal Establishment Clause, *id.* at 848-49.[11] Therefore, the most that can be said about this "conflict" is that the Maryland Constitution is different

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[11] *Barghout* is further distinguished from this case by the fact, which COLPA itself points out, Pet. at 12, that a vendor does not violate the law if he has a good faith belief that his food complies with kosher requirements. 600 A.2d at 842. Here Arthur Weisman of Ran-Dav's County Kosher was prosecuted by New Jersey because his sincere adherence to the laws of *kashrut* as taught by his supervising rabbi did not comport with the different understanding of kosher requirements taught by the state's appointed rabbis.

from the New Jersey Constitution, which is an issue wholly beyond the interest, competence and jurisdiction of this Court.

COLPA next relies on *Erlich v. Municipal Court*, 55 Cal.2d 553, 360 P.2d 334 (1961), even though COLPA itself admits that the case did not involve the Establishment Clause. Pet. 20.[12] Finally, COLPA invokes this Court's decision in *Hygrade Provision Co. v. Sherman*, 266 U.S. 497 (1925), as authority for the proposition that "orthodox Hebrew religious requirements" are "sufficiently definite to withstand constitutional challenge." Pet. at 13. Petitioner fails to mention that the "constitutional challenge" in that case involved the Due Process Clause rather than the Establishment Clause, and is therefore of no relevance here. Perhaps Petitioner is unaware that the Establishment Clause was not even held applicable to the states through the Fourteenth Amendment until 20 years after *Hygrade* was decided. *See Everson v. Bd. of Education*, 330 U.S. 1, 15-16 (1947).[13]

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[12] A more modern California decision that COLPA does not cite agrees with the New Jersey Supreme Court that "the determination of whether [a vendor's] meat is kosher is an ecclesiastical question":

> Food which is kosher . . . is food of the type which is permitted and which has been prepared in conformity with Jewish law . . . . As that law is open to interpretation, rabbinic authorities may differ on the question of whether preparation of specific meat conforms to the pertinent law . . . . [I]f rabbinic authorities' interpretation of Judaic law render disparate findings concerning the status of meat purported to be kosher, the court lacks jurisdiction to settle the dispute.

*Korn v. Rabbinical Council of California*, 148 Cal.App.3d 491, 195 Cal.Rptr. 910, 913-15 (Cal.Ct.App. 1983). *See also United Kosher Butchers Ass'n v. Assoc. Synagogues of Greater Boston*, 349 Mass. 595, 211 N.E.2d 332 (1965)(if the court were to consider plaintiffs' cause of action, it "would inevitably be faced with such questions as who has the authority to enforce Kashruth in [this region], what are the criteria for determining which foods are kosher, and what procedures must the body in charge of Kashruth follow. All of these questions are determined only by reference to Jewish law, a domain into which the courts will not venture.").

[13] COLPA's final citation is to *Sossin Systems, Inc. v. City of Miami Beach*, 262 So.2d 28 (Fla.Dist.Ct.App. 1972), in which a state intermediate appellate court simply denied a petition for certiorari to review a municipal court conviction for having sold non-kosher food as kosher "with intent to defraud." *Id.* at 29. In the single brief paragraph of dicta devoted to the Establishment Clause, the court merely asserted that such laws had previously been upheld under that clause, erroneously relying on *Hygrade*. 262 So.2d at 30.

COLPA's invocation of these cases and this supposed "conflict among state courts" as a basis for certiorari is frivolous and constitutes a waste of this Court's time.

## IV. THE PETITIONER OFFERS NO REASON FOR THIS COURT TO RECONSIDER ITS ESTABLISHMENT CLAUSE JURISPRUDENCE, AND THIS CASE WOULD IN ANY EVENT BE AN UNSOUND VEHICLE FOR ANY SUCH UNDERTAKING.

COLPA notes that there are two cases pending in this Court that may involve application of the test announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See Zobrest v. Catalina Foothills School District*, No. 92-94; *Lamb's Chapel v. Center Moriches Union Free School District*, No. 91-2024. Pet. at 14. But Petitioner offers not one word explaining how the resolution of those cases involving the special context of religion in schools would affect the decision below. Neither case presents any issue of state enforcement of religious orthodoxy, state court adjudication of doctrinal disputes among religious authorities, or the delegation to religious leaders of a formal role in determining where and against whom the state's laws will be enforced.

Whatever disagreement there might be among the Members of this Court with respect to the *Lemon* test has no bearing on the decision below, for this case does not involve the more difficult problem of neutral, nonsectarian state accommodation of all religious beliefs. What is at issue here is state intervention into an ancient and continuing doctrinal debate over the Orthodox Jewish dietary laws of *kashrut*, involving state legislative enactment of one interpretation of those laws and state civil and criminal enforcement against food vendors who adhere to a different understanding of *kashrut* taught by their own Orthodox rabbis. The Establishment Clause principles necessary to resolve these issues are not in flux.

Laws that "grant[] a denominational preference," such as the kosher regulations at issue here, are subject to "strict scrutiny" even when the state's interest is the important one of protecting citizens

from fraud. *Larson v. Valente*, 456 U.S. 228, 246-47 (1982). Attempts by the state to enforce a commercial code that enacts one interpretation of orthodoxy raise a "substantial danger that the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs." *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976). *See also Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 448 (1969).

The kosher enforcement regime "enmesh[es]" religious leaders "in the exercise of substantial government powers contrary to this Court's consistent interpretation of the Establishment Clause; 'the objective is to prevent, as far as possible, the intrusion of either Church or State into the precincts of the other.'" *Larkin v. Grendel's Den*, 459 U.S. 116, 126 (1982). Although "[s]ome limited and incidental entanglement between church and state is inevitable in a complex modern society," *id.* at 123, New Jersey's enactment and enforcement of one interpretation of Orthodox dietary laws is neither "limited" nor "incidental." It amounts to "'a fusion of governmental and religious functions'" in the area of religious dietary doctrine. *Id.* at 126. Such "direct cooperation between state officials and religious ministers" is flatly forbidden by the First Amendment, *McGowan v. Maryland*, 366 U.S. 420, 452 (1961), which prohibits a State from employing religious authorities as an adjunct of the civil law enforcement regime "to perform the function of interpreting and applying state standards." *Presbyterian Church*, 393 U.S. at 451. The constitutional vice is compounded by the fact that New Jersey's courts, in the course of enforcing the regulations and deciding which religious authority's understanding of *kashrut* is truly orthodox, would inevitably become embroiled — as the lower courts were here, in dismissing Rabbi Cohen's teachings — in deciding ecclesiastical questions that are wholly inappropriate for resolution by civil authorities. *See, e.g., Presbyterian Church*, 393 U.S. at 440; *Serbian Orthodox*, 426 U.S. at 709.

The kosher regulations were also beyond the constitutional pale because this intermingling of state power and religious doctrine created "the danger of political fragmentation and divisiveness on religious lines." *Grendel's Den*, 459 U.S. at 127. The record shows that the State's enforcement of the regulations under Rabbi

Dombroff's direction in this case provoked precisely the sort of turmoil identified by this Court in *Grendel's Den*. *See* App.Div. App. at Asa57, Asa72, Asa73. In that case, where the Court struck down a law delegating a role in liquor licensing to local churches, this Court noted the risk that this power could be "employed for specifically religious goals, for example, favoring liquor licenses for members of that congregation or adherents of that faith." 459 U.S. at 125. Even greater opportunities for abuse are manifest in New Jersey's regime for enforcing one view of Orthodox doctrine as civil law. Indeed, the record contains disturbing indications — unrebutted by Petitioner — that the State's Passover raid (at Rabbi Dombroff's direction) on kosher establishments supervised by Rabbi Cohen was tainted by and a product of a long-standing doctrinal dispute between Rabbi Cohen of New York and some rabbinical authorities in New Jersey. *See supra* pages 3-4.

Just last Term, the opinions in *Lee v. Weisman*, 112 S.Ct. 2649 (1992), confirmed that there is continued unanimity on the central proposition that the state must not insinuate itself into sectarian "religious debate," because "[a] state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed." *Id.* at 2657, 2658 (Kennedy, J., for the Court). "Government may neither promote nor affiliate itself with any religious doctrine or organization, nor may it obtrude itself in the internal affairs of any religious institution." *Id.* at 2661-62 (Blackmun, J., joined by Stevens and O'Connor, JJ., concurring). This reflects the "Madisonian concern that secular and religious authorities must not interfere with each other's respective spheres of choice and influence." *Id.* at 2663 n.3 (Blackmun, J., joined by Stevens and O'Connor, JJ., concurring). By requiring the state courts to arbitrate between competing understandings of just what is kosher under Jewish law, the New Jersey regulatory regime "invite[s] the courts to engage in comparative theology. I can hardly imagine a subject less amenable to the competence of the . . . judiciary, or more deliberately to be avoided where possible." *Id.* at 2671 (Souter, J., joined by Stevens and O'Connor, JJ., concurring).

Although they differed with the Court on other issues, the dissenters in *Weisman* agreed that the Establishment Clause "ruled

out of order government-sponsored endorsement of religion — even when no legal coercion is present . . . — where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world, are known to differ." *Id.* at 2683-84 (Scalia, J., joined by Rehnquist, C.J., and White and Thomas, JJ., dissenting). The state may not "lend its power to one or the other side in controversies over religious authority or dogma." *Employment Division, Dept. of Human Resources v. Smith*, 494 U.S. 872, 877 (1990)(Scalia, J., for the Court). Yet that is precisely what the New Jersey kosher regulatory regime did here.

Thus, the nuances of the *Lemon* test and the controversy surrounding them are simply not implicated by the decision below, since the outcome was in any event dictated by Establishment Clause principles — on which this Court is unanimous — that forbid state involvement in sectarian religious debates and the use of coercive state power to promote religious doctrine. The decision below presents no occasion to choose between the *Lemon* test and any alternative "coercion" theory of the Establishment Clause; therefore, there is no reason for this Court to grant a writ of certiorari nor even to hold the petition pending the decision of any other case.

Finally, we note that the caption of this case itself dramatically demonstrates the religious entanglement created by the New Jersey kosher regulations. Petitioner COLPA, a sectarian organization of lawyers and social scientists dedicated to promoting the interests of the Orthodox Jewish Community, seeks relief against the State of New Jersey, respondent, which has abandoned its legal defense of the invalidated regulations, is already complying with the lower court's mandate, and will be proposing different rules any day now. The Petition thus asks this Court to resurrect the old regulations at the behest of private religious interests and to foist them upon a State that no longer wants them.[14] It is difficult to imagine a case

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[14] The appearance of a rabbinical association as a would-be *amicus* underscores this attempt by religious groups to have this Court force a sovereign state to enforce and police that group's religious doctrines.

in which the legitimate interests of a secular state and a sectarian religious group diverge more sharply.

Furthermore, there is no argument from the Petitioner or anyone else that the new draft regulations, or the kosher bill pending in the New Jersey Senate, or the regulatory approach outlined by the New Jersey Supreme Court below will be inadequate to protect kosher consumers from fraud. Nor is there anything in the record that would support such an argument. Therefore, the *only* rationale for reinstituting the particular regulations that New Jersey has abandoned is to promote the agenda of certain private religious organizations by having the State enforce the particular interpretation of Orthodox dietary laws that those organizations advocate. That is a job for religious exegetes, not civil authorities. When it comes to interpreting, applying, and living by the ancient religious laws of *kashrut*, Ran-Dav's, the Weismans, and the New Jersey Alliance of Kosher Caterers answer not to the State of New Jersey, but to their own faith, to their own rabbis, and to God — who, under both the New Jersey and Federal Constitutions, is in this realm of conscience a truly Higher Authority.

## CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 92-1053 (5)

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

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NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA"),

*Petitioner,*

v.

RAN-DAV'S COUNTY KOSHER, INC., *et al.*,

*Respondents,*

and

STATE OF NEW JERSEY, *et al.*,

*Respondents.*

---

**On Petition for a Writ of Certiorari to the Supreme Court of New Jersey**

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## PETITIONER'S REPLY BRIEF

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to the Supreme Court of New Jersey

# PETITIONER'S REPLY BRIEF

The respondents raise only one subject that warrants submission of a reply. The remainder of the assertions made in the Brief in Opposition are adequately covered in our Petition.

Respondents ask that certiorari be denied on the asserted ground that COLPA's standing is controlled by *Diamond v. Charles*, 476 U.S. 54 (1986), where a pro-life doctor unsuccessfully tried to appeal a ruling that the Illinois Abortion Law was unconstitutional although the State had failed to appeal. Respondents ignore the distinctions between *Diamond v. Charles* and this case, and wholly fail to mention *Director, Office of Workers' Compensation Programs v. Perini North River Associates*, 459 U.S. 297 (1983), which, in fact, controls this case and supports the conclusion that the constitutional issues on which both COLPA and the State of New Jersey disagree with the majority of the court below are properly before this Court for decision.

The Court majority in *Diamond v. Charles* noted at the outset of its opinion that the private party who supported the constitutionality of Illinois' Abortion Law was one "whose own conduct [was] neither implicated nor threatened" by the law. 476 U.S. at 56. The Court held that, if the State did not appeal, it was not sufficient for the appealing intervenor to be a pediatrician who opposed abortion legislation and who described himself as "a doctor, a father, and a protector of the unborn." 476 U.S. at 66.

The Court did *not* rely, as the respondents are urging the Court to do in this case, merely on the fact that the State had not appealed. Respondents argue that it follows from the fact that the private intervenor could not secure review by this Court in *Diamond v. Charles* that the same result should follow here. But it was only after going through a careful analysis of the intervenor's interests (476 U.S. at 65-67), that this Court concluded in *Diamond v. Charles* that he had no legal interest that gave him standing as a party to any case or controversy. Indeed, Justice O'Connor believed that he was not even a proper intervenor in the lower court. 476 U.S. at 73-78.

This case is wholly different. COLPA is a well-recognized organization, known to this Court and to lower courts as the spokesman for the Orthodox Jewish community. [1] Its members include consumers who are most directly and immediately protected by truth-in-advertising regulations relating to kosher foods. In applying for leave to intervene, COLPA advised the New Jersey Supreme Court that it spoke for the Orthodox Jewish community, "the main consumer of Kosher food in America." That representation

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[1] A roster of the cases in this Court in which COLPA has represented parties or filed *amicus* briefs on behalf of the Orthodox Jewish community is the following: *Zobrest v. Catalina Foothills School District*, No. 92-94; *Lamb's Chapel v. Center Moriches Union Free School District*, No. 91-2024; *Church of the Lukumi Babalu Aye, Inc. v. Pichardo*, No. 91-948; *Lee v. Weisman*, 112 S. Ct. 2649 (1992); *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 572 (1989); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987); *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986); *Goldman v. Weinberger*, 475 U.S. 503 (1986); *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Aguilar v. Felton*, 473 U.S. 402 (1985); *Estate of Donald E. Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985); *Mueller v. Allen*, 463 U.S. 388 (1983); *Bob Jones University v. United States*, 461 U.S. 574 (1983); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Committee for Public Education v. Regan*, 444 U.S. 646 (1980); *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *Parker Seal Co. v. Cummins*, 429 U.S. 65 (1976); *Wheeler v. Barrera*, 417 U.S. 402 (1974); *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Dewey v. Reynolds Metals Co.*, 402 U.S. 689 (1971); *Stimpel v. State Personnel Board of California*, 400 U.S. 952 (1970); *Walz v. Tax Commission of the City of New York*, 396 U.S. 925 (1969); *Flast v. Cohen*, 392 U.S. 83 (1968); *Board of Education of Central School District No. 1 v. Allen*, 392 U.S. 236 (1968).

was never challenged and the application to intervene was unopposed. Respondent cannot now claim, as it does in its Brief in Opposition, that the factual record is inadequate if it wholly failed to contest the requested intervention and to demand a more specific factual showing in the court below. In any event, the Affidavit of Dennis Rapps, Executive Director of COLPA, that appears as Appendix I, establishes the necessary facts for such standing.

Rather than being an intervenor who has only an "abstract concern" for the law being challenged, the members of COLPA and the larger Orthodox Jewish community COLPA represents suffer a direct "injury in fact" by reason of the New Jersey Supreme Court's 4-to-3 declaration that the law is unconstitutional. The organization clearly has standing to represent the interests of its members in the effective regulation of merchants falsely describing their products as "kosher" as surely as an organization representing the elderly had standing in *Schweiker v. Gray Panthers*, 453 U.S. 34, 40 n.8 (1981).

Nor is the interest of COLPA's members an interest that may only be vindicated by New Jersey's Attorney General. In *Diamond v. Charles*, the law was a criminal statute, and this Court observed that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." 476 U.S. at 64, quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973). To be sure, the New Jersey law at issue here authorizes the Attorney General to assess penalties against anyone who has engaged in an "unconscionable commercial practice." New Jersey Stat. Ann. § 56:8-3.1. Under N.J.S.A. § 56:8-8 the Attorney General may also obtain an injunction against any such practice. But N.J.S.A. § 56:8-19 provides, as well, a private right of action:

**56:8-19. Action or counterclaim by injured person; recovery of treble damages and costs**

> Any person who suffers any ascertainable loss of moneys or property, real or personal, as a result of the use or employment by another person of any method, act, or practice declared unlawful under this act . . . may bring an action or assert a counterclaim therefor in any court of competent jurisdiction. In any action under this section the court shall, in addition to any other appropriate legal or equitable relief, award threefold the damages sustained by any person in interest. In all actions under this section the court shall also award reasonable attorneys' fees, filing fees and reasonable costs of suit.

Under this provision any member of COLPA, or any other consumer of kosher food, who purchases food branded "kosher" in New Jersey and subsequently discovers that the food he purchased was known not to be kosher may bring a civil lawsuit for damages in which treble damages plus attorneys' fees may be recovered. The 4-to-3 decision in the New Jersey Supreme Court denies this otherwise available civil remedy to a person who has purchased meat or other non-kosher items from the respondent's store and who discovers that the meat does not meet the standard of the invalidated regulations. Prior to the decision of the court below, the existence of a civil right of action was firmly established by the regulation that defined "kosher." After the decision, COLPA and its members have no right to sue for

damages against Ran-Dav or anyone else who sells meat as "kosher" that does not meet truly kosher standards.

For these reasons there is absolutely no merit to the claim that the petition must be dismissed at its present juncture because COLPA lacks standing under Article III. COLPA has Article III standing, and the split decision of the New Jersey Supreme Court unjustifiably denied COLPA and its members the right to pursue consumer deception actions in Baltimore.

Moreover, there is a difference in these circumstances between review on certiorari and review on appeal. In *Director, Office of Workers' Compensation Programs v. Perini North River Associates*, 459 U.S. 297, 302-05 (1983), this Court noted that all parties to a decision below remain parties under this Court's Rules, regardless of who petitions for a writ of certiorari. The Court agreed that a respondent may "seek reversal of the judgment . . . on any ground urged" in the lower court (quoting from *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 783-84 n.14 (1980)). Hence the party who brings the case here need not be the same party who has Article III standing. So long as the party with Article III standing is before the Court — whether by his own petition or as a "respondent," by virtue of Rule 12.4 — that party may present a case or controversy by taking a position on the litigation that is adverse to the position of another respondent. That is exactly what has happened in this case. The State of New Jersey has stated in its brief to this Court that it agrees with COLPA and disagrees with the other set of respondents. Hence this case should proceed to a decision just as the *Perini North River Associates* case did.

## CONCLUSION

For the foregoing reasons and those set forth in the Petition for a Writ of Certiorari, certiorari should be granted.

Respectfully submitted,

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February 1993

# APPENDIX I

No. 92-1053

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA"),

*Petitioner*,

v.

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*Respondents*,

and

STATE OF NEW JERSEY, *et al.*,

*Respondents*.

On Petition for a Writ of Certiorari
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## AFFIDAVIT OF DENNIS RAPPS

Dennis Rapps, an attorney-at-law admitted to the Bar of the United States Supreme Court and the courts of the State of New York, under the penalties of perjury, affirms as follows:

1. I have been the Executive Director of the National Jewish Commission on Law and Public Affairs ("COLPA") since 1970 and I am personally knowledgeable about the backgrounds of most of its members.

2. COLPA has a number of members who reside in the State of New Jersey who I know to be kosher food consumers.

3. As kosher food consumers these COLPA members would have a private right of civil action for alleged violations of the regulations invalidated by the Supreme Court of New Jersey.

Dated: New York, New York
February 8, 1993

/s/
DENNIS RAPPS

MOTION FILED JAN 27 1993

No. 92-1053

In The

# Supreme Court of the United States

October Term, 1992

NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA"),

*Intervenor-Petitioner,*

*vs.*

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*Plaintiffs-Respondents,*

-and-

STATE OF NEW JERSEY; PETER N. PERRETTI, JR.; JAMES J. BARRY, JR.; RABBI YAKOV M. DOMBROFF; ATTORNEY GENERAL'S ADVISORY COUNCIL ON KOSHER FOOD; MORRIS GLATT; DIANE LAMONACO; AND DOES 1-50,

*Defendants-Respondents.*

*On Petition for a Writ of Certiorari to the Supreme Court of New Jersey*

## MOTION WITH BRIEF OF APPLICANTS NEW JERSEY ASSOCIATION OF REFORM RABBIS, RECONSTRUCTIONIST RABBINICAL ASSOCIATION, NEW JERSEY REGION OF THE RABBINICAL ASSEMBLY AND THE RABBINICAL COUNCIL OF NEW JERSEY AS *AMICUS CURIAE* TO FILE A BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The New Jersey Association of Reform Rabbis, the Reconstructionist Rabbinical Association, the New Jersey Region of Rabbinical Assembly and the Rabbinical Council of New Jersey (hereinafter referred to as "Applicants") respectfully move this Court for leave to file the accompanying brief as *amicus curiae* in support of the Petition for a Writ of Certiorari in this case. Consent of the attorneys for the intervenor-petitioner herein and defendants-respondents State of New Jersey, *et al.*, have been obtained, however, the newly-designated attorney for plaintiffs-respondents Ran-Dav's County Kosher, Inc., *et al.*, herein, Brian Koukoutchos, Esq., has refused to consent to the Applicants' filing of the accompanying brief as *amicus curiae.*

This case concerns a facial challenge to the validity of state regulations concerning the sale of foods which are kosher, that is, prepared in accordance with Jewish dietary laws. The requirement of eating only kosher foods is fundamental to the practice of Orthodox and Conservative Judaism; its ritualistic importance is also recognized by Reform and Reconstructionist Judaism. Because kosher food is so fundamental to the practice of Judaism, Jews have a particular interest in a state regulatory system aimed at protecting the rights of consumers of this type of food.

Applicants New Jersey Association of Reform Rabbis, Reconstructionist Rabbinical Association, New Jersey Region of the Rabbinical Assembly and the Rabbinical Council of New Jersey have an interest in this case in that their members serve congregations having as members more than 200,000 Jewish New Jersey residents covering the full spectrum of observance within Jewish life.

Although the Petition for Writ of Certiorari makes passing mention of the Applicants' role as *amicus curiae* before the New Jersey courts, Applicants believe that the discussion of this point is inadequate in that it does not fully explain the Applicants'

involvement in the proceedings below, nor does it discuss the vast numbers of Jewish congregants whose interests are represented by the rabbinic members of the Applicant Organizations. Unlike petitioner National Jewish Commission on Law and Public Affairs (COLPA), which is a national organization, the Applicants' New Jersey congregations are comprised of tens of thousands of consumers of kosher products in New Jersey, all affected adversely by the decision of the New Jersey Supreme Court below. Applicants' position is indicative, if not representative, of the interest of millions of consumers around the country who will be adversely affected should the decision below be allowed to stand.

Moreover, although the petitioner and the Applicants are in agreement on many points, the Applicants have no reason to believe that their argument will be adequately presented, expanded or made complete in this Court. If Applicants' argument is approved by this Court, the decision of the court below must be reversed.

Respectfully submitted,

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**BRIEF OF APPLICANTS NEW JERSEY ASSOCIATION OF REFORM RABBIS, RECONSTRUCTIONIST RABBINICAL ASSOCIATION, NEW JERSEY REGION OF THE RABBINICAL ASSEMBLY AND THE RABBINICAL COUNCIL OF NEW JERSEY AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI**

## STATEMENT OF INTEREST OF AMICUS CURIAE

Applicants represent the four major branches of Judaism in the State of New Jersey:

- The Rabbinical Council of New Jersey consists of 40 Orthodox Rabbis whose congregations have an aggregate membership of approximately 40,000 people. Orthodox Jewish tradition mandates the eating of only kosher food, *i.e.*, those foods permitted by the dietary laws of the Jewish religion.

- The New Jersey Region of the Rabbinical Assembly of America consists of 60 Conservative Rabbis whose congregational memberships number approximately 70,000 persons in Northern and Central New Jersey. Conservative doctrine accepts the requirement of adherence to the Jewish dietary laws and many Conservative Jews observe all of the kosher dietary requirements.

- The New Jersey Association of Reform Rabbis consists of 58 members whose congregations have some 80,000 members. While the majority of Reform Jews do not personally observe the kosher rules, they do recognize the ritual importance of kosher food to the other branches of Judaism. Many Reform synagogues permit only kosher catering on their premises.

- The Reconstructionist Rabbinical Association has approximately 12 members in New Jersey, whose total congregational memberships number about

> 10,000 persons; Reconstructionist doctrine calls for the observance of Jewish rituals based on their traditional and historical values. While adherence to dietary laws is not required, Reconstructionists believe that all Jewish institutions should be kosher and that the dietary laws are an important element of Jewish tradition.

Thus, consumption of genuine kosher food is fundamental to all four branches of Judaism. While the religious laws relating to kosher foods are rigorous and exacting, altogether prohibiting items such as pork, shellfish and certain animal parts, the physical appearance of most kosher foods is identical to their non-kosher counterparts. Moreover, strict observance of these religious laws adds significantly to the cost of these products. This cost differential provides ample opportunity for the dishonest vendor to charge a premium for non-kosher food represented to be kosher.

Consumers of kosher foods[1] must therefore rely on the state to protect consumers through adequate regulation of this industry. The Applicants in particular have a vital interest in seeking review of the New Jersey Supreme Court decision: if left undisturbed, the ruling of the court below would leave tens of thousands of consumers, including many of their congregants, largely unprotected from unscrupulous sellers who may falsely represent foods to be kosher.

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1. Not only Jews, but other individuals for religious or medical reasons need to be assured of the ingredients and preparation of foods certified to be kosher.

## SUMMARY OF ARGUMENT

The majority opinion of the New Jersey Supreme Court rests upon several key factual errors, causing that court to determine that the State regulations at issue foster excessive entanglement in religious affairs, in violation of the "third prong" of the test enunciated by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In particular, the majority of the court below ruled there is no uniform standard among the four branches of Judaism for determining what is kosher and that disputes over that issue would inevitably arise requiring the state and/or the courts to interpret Jewish law. (Pet. App. A, at 20a). This is simply not the case.

The court below confused differences of opinion as to the *need to observe* kosher requirements with the requirements themselves. Supporting affidavits submitted by the Applicants as *amicus* below clearly state that the Orthodox standards for kosher food are universally recognized by all four branches of Judaism. In practice, the issues which arise involving kosher foods are not disputes over doctrine, but disagreements over facts.

## STATEMENT OF THE CASE

Applicants adopt the Statements of the Case included in the Petition for Writ of Certiorari by the National Jewish Commission on Law and Public Affairs and the Brief on Behalf of Respondents, State of New Jersey, *et al.* in Support of the Petition for a Writ of Certiorari.

## ARGUMENT

All four movements of the Jewish faith are united in their assertion that the term "kosher," without qualification, is understood to mean the historical Orthodox standard. The majority opinion in the court below not only grossly misinterprets that

standard, but manufactures out of whole cloth differences among the four movements as to what is considered kosher.

Under the state regulations at issue, "kosher" means a food product "prepared and maintained" in strict compliance with Orthodox Judaism's law and customs. Notwithstanding the contrary assertion of the court below, food preparation need not be supervised by a rabbi to be kosher; supervision does not change the status of food as kosher or non-kosher. The regulations are meant to protect against fraud and are based on objective and factual inquiries into the manner in which food described as kosher is produced and handled.

The majority below rests its conclusions on a series of erroneous factual assumptions designed to buttress its conclusion that the state kosher regulations are an impermissible entanglement of the state in religious affairs. Chief among these erroneous assumptions is the notion that "Without proper religious supervision, certain foods are simply non-kosher, even if they are constituted and prepared in identical fashion to kosher food." (Pet. App. A at 5a). This faulty premise is repeated at several other points in the decision. (Pet., App. A at 6a, 8a, 28a).[2]

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2. The majority also attempts to create a connection between the involvement of religious personnel in the supervisory process and the regulatory scheme itself. For example, the majority repeatedly infers that the regulatory scheme is tainted by the fact that the *present* Chief of the Bureau of Enforcement happens to be an Orthodox rabbi. While citing this coincidence no fewer than three times, the majority fails to point out that rabbinical ordination or even adherence to the Jewish religion is *not* a requirement for the job, and that its present holder is the first rabbi to occupy the post. (Pet. App. A, 17a, 18a, 25a).

The majority then cites the existence of the State Kosher Advisory Committee, a virtually defunct body created by an executive directive with no

(Cont'd)

The purpose of religious supervision, to the extent a purveyor of kosher foods *voluntarily* elects to provide for supervision, is to offer the consumer some greater confidence in the reliability of the vendor and his products. Food is either kosher or not kosher, without regard to supervision.

More importantly, the majority fails to distinguish between (i) differences of belief as to the need to observe the kosher laws and, (ii) universal agreement as to a single standard of kosher. This failure, compounded by the court below's misreading of secondary sources, results in the erroneous and highly speculative conclusion that differences as to kosher standards would inevitably need to be interpreted by the state or the courts.

The majority's conclusions also fail to distinguish between the basic standards of the dietary laws, and more pietistic standards that individuals may apply to themselves. The existence of these "stricter" standards or "shades of observance" *id.*, in no way delegitimatizes the historical standards or reduces their universal acceptance. As the dissent below points out, "Concededly, some religious scholars may disagree over nuances of kosher-food preparation standards. However, these disagreements are not implicated by the objective regulations at issue here." (Pet. App. A at 48a).

The majority below engages in theoretical speculation when it predicts the possibility of the state becoming involved in deciding

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(Cont'd)
oversight function, as further evidence that "the regulations themselves have a principally religious meaning." (Pet. App. A at 18a). Neither a vendor nor the State Bureau of Enforcement is required to employ any particular religious personnel under the regulations. (Pet. App. A at 47a). Reliance on the involvement of specific religious personnel is improper in the context of a *facial* challenge to the regulations.

the correctness of a "variant" religious interpretation. As the facts of this case illustrate, the issues which arise in practice are not disputes over doctrine, but disagreement over facts. Was the product mislabeled? Did the product come from an acknowledged non-kosher source? Such speculation is inappropriate in the context of a *facial* challenge. As the dissent below notes, this Court has stated previously: "it has not been the Court's practice, in considering facial challenges to statutes . . . to strike them down in anticipation that particular applications may (produce unconstitutional results)." *Roemer v. Board of Public Works*, 425 U.S. 736, 761 (1976), cited with approval in *Bowen v. Kendrick*, 487 U.S. 589, 601 (1988). (Pet. App. A at 39a).

Applicants seek a review of the New Jersey Supreme Court's analysis, focusing on the real issues and concerns involved in the regulation of kosher food sales. The history of the enforcement process to date in New Jersey and many other states reveals numerous clear instances of consumer fraud knowingly perpetrated on the kosher food consuming public. No actual case involving claims of "variant" interpretations of the historical standard of kosher has been cited to the courts below. "The record is devoid of evidence to support the conclusion that by enforcing the regulations to identify fraudulent representation of kosher foods, the State necessarily interprets religious law or applies religious principles." (Pet. App. A at 54a).[3]

As the dissent below concluded on this point: "In assuming that all disputes would entail application of Jewish law . . . the majority remains preoccupied with those isolated, debatable aspects of kosher-food preparation that may be of theoretical interest to religious scholars, but have virtually nothing to do with this facial challenge." (Pet. App. A at 55a).

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3. There has been a similar absence of religious dispute during the 75 years of kosher foods enforcement in New York. (Pet. App. B at 85a).

## CONCLUSION

For the above stated reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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